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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 428

AMERICAN SURETY CO. OF NEW YORK, *Petitioner*

v.

RAMONITA BARRIENTOS, ET AL., *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PUERTO RICO

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To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petitioner, American Surety Co. of New York, prays that a writ of certiorari be issued to review the judgments of the Supreme Court of the Commonwealth of Puerto Rico entered on June 27, 1969 in the cases entitled and numbered "Ramonita Barrientos, et al., plaintiffs-appellees v. Government of the Capital, et al.,

defendants-appellants and appellees, Review Nos. R-62-61, 67, 69-156; 64-188; 64-214", modifying and affirming the judgments rendered on February 12, 1962, October 1, 1964 and November 23, 1964 by the Superior Court of Puerto Rico, San Juan Section.

OPINIONS BELOW

The Superior Court of Puerto Rico, San Juan Section, rendered a "Statement of the Case, Proven Facts and Conclusions of Law" on July 29, 1960, which is not officially reported but is appended hereto at pages 1a-28a. The opinion of the Supreme Court of Puerto Rico entered on June 27, 1969 has not yet been officially reported. It is appended hereto at pages 35a-58a.

JURISDICTION

On the basis of the aforementioned "Statement of the Case, Proven Facts and Conclusions of Law" and after the rendition of the master's awards assessing the property damages, the Superior Court of Puerto Rico entered a consolidated judgment on February 12, 1962, (App. 30a), and thereafter in three of the other actions judgments were also finally entered on October 1, 1964, and November 23, 1964 (App. 32a, 33a).

On appeal, a writ of review having been issued as to all of the actions involved herein (R. 115), the Supreme Court entered judgments on June 27, 1969 (App. 59a-61a). The petitioner herein filed motion for reconsideration on July 7, 1970 (App. 61a). After oral argument, the same was denied without opinion by order entered on April 24, 1970 (App. 66a).

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C.A. sections 1258(3) and 2101(c).

QUESTIONS PRESENTED

1—Whether it constitutes a deprivation of property without due process of law to hold the surety of a storm sewer subcontractor liable for damages which had been caused to third parties by the negligence of the subcontractor, simply because the surety subsequently agreed with its sole obligee, the principal contractor, to complete the work.

2—Whether the liability insurer of the subcontractor of a municipal storm sewer can be held liable to pay more than the limits it contracted to pay under its liability policy for damages to adjacent property owners caused solely by the negligence of the subcontractor, without violating the due process clause of the Fifth or Fourteenth Amendments to the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause of the Fifth or Fourteenth Amendments to the Constitution of the United States.

STATEMENT OF THE CASE

This case commenced with the filing of ordinary negligence actions in the Superior Court of Puerto Rico by numerous property owners against the City of San Juan, Puerto Rico (Government of the Capital), the principal contractor (Nolla, Galib & Co.), the subcontractor (Island Constructors, Inc.) and the liability insurers of the latter (U. S. Casualty Co. and petitioner herein, American Surety Co. of N. Y.), claiming compensation for damages to their properties as a result of the construction of a municipal storm sewer and pumping station in the section of Ocean Park, San Juan, Puerto Rico. The defendants, de-

nied liability and cross-claimed each other for indemnity. The petitioner herein, American Surety Co., also denied coverage under its policy on the grounds that the damages were not "caused by accident" or were otherwise excluded, and also asserted its policy limits for property damages as being $25,000 per accident and $50,000.00 *intoto*.[1]

After a lengthy trial, the Superior Court, entered a "Statement of the Case, Proven Facts and Conclusions of Law" dated July 29, 1960 (App. 1a) holding that all of the damages suffered by plaintiffs were caused solely by the negligence of the subcontractor and that defendant American Surety Co. of New York, petitioner herein, was liable to plaintiffs not only under its liability insurance policy but also under the performance bond which it had issued in favor of the principal contractor (Nolla, Galib & Co.) to guarantee the performance of the subcontract for the storm sewer. It also held that petitioner herein had to pay the full amount of the damages regardless of the fact that the bond fixed the sum of $99,322.60 as its limit of liability thereunder, nor of the fact that petitioner had exhausted this sum in the completion of the project after the subcontractor defaulted, and even though the bond expressly stated that it was for the exclusive benefit of the principal contractor, Nolla, Galib & Co. The municipality and the principal contractor as well as its insurer and surety (U. S. Casualty Co.) were ex-

[1] The basic pleadings of the parties in the action of plaintiff Ramonita Barrientos appear in the record at pages 12-53. In the stipulation as to the record to be filed before this Court, at page 2 thereof, the parties stipulated that similar pleadings were filed in the other actions. (R. 2). See also the second paragraph of the Superior Court's "Statement of the Case" at pages 2a-3a of the Appendix.

honerated from liability and preliminary judgments were entered accordingly on July 29, 1960 (R. 89), whereupon the cases were referred to a master for the assessment of the damages to the properties involved. After the rendition of the master's awards (R. 90, 97), money judgments were entered on February 12, 1962, October 1, 1964 and November 23, 1964 against the subcontractor and petitioner herein, amounting to a total of $271,681.10. (App. 29a-34a), which principal sum with interest actually exceeds $400,000.00.

Upon the petitions of the subcontractor and petitioner herein, on June 1, 1967 the Supreme Court issued a writ to review all of the judgments in favor of the plaintiffs involved in this case. (R. 115). In the said petitions thirteen errors were raised against the holding of the trial court principally attacking its conclusions as to negligence on the part of the subcontractor, the exhoneration of the other defendants from liability to the subcontractor and petitioner for indemnity, and the liability of the latter under its insurance policy or its performance bond. (R. 102-114).[2]

On June 27, 1969 the Supreme Court of Puerto Rico entered an opinion and judgment confirming the findings of the trial court to the effect that all of the damages to plaintiffs properties were solely caused by the negligence of the subcontractor while it was performing the work and holding that the municipality of San

[2] Several of the plaintiffs also appealed from the judgments in favor of the municipality, the principal contractor and its surety. These appeals were numbered R-62-67; 62-69. The appeal of plaintiff Valdivieso (R-62-68) involved only the denial of certain items of damages. The municipality nor the principal contractor appealed from the dismissal of their cross-claims against the subcontractor.

Juan (Government of the Capital) was primarily responsible therefor to plaintiffs on the grounds that it had the non-delegable duty to them to see that all of the necessary precautions were taken by the subcontractor so that the work was performed without causing damages to the adjacent properties. The subcontractor was held directly liable to the municipality for all damages the latter paid to plaintiffs.[3] It then went on to decide that damages caused to plaintiffs' properties were "caused by accident" and were consequently covered by the liability policy issued by petitioner herein.

However, with respect to the right of plaintiffs to claim for their damages under the provisions of the construction contract or under petitioner's performance bond, the Court stated:

> "We need not consider whether plaintiffs-appellees have the capacity to require the performance of the contractual obligations of Island Constructors, Inc. in connection with the restoration of the damaged properties to their original state. Also, we do not have to consider whether or not plaintiffs-appellees are entitled to claim under the bond executed by American Surety Co. for the execution of the work, since in view of our former conclusion fixing primary liability upon the Government of the Capital, the latter shall be directly liable to plaintiffs and, as we have already seen, Island Constructors, Inc. shall be held directly,

[3] It seems to us beyond comprehension why the Supreme Court of Puerto Rico in plaintiffs' appeals took it upon itself, in its judgment therein (App. 60a) to sustain the cross-claim of the municipality against the subcontractor when the former never appealed from the trial court's judgments dismissing the same (App. 30a-34a), and went even farther to sustain an alleged cross-claim or third party complaint against petitioner herein, which the municipality never filed.

> liable to the Government of the Capital for all damages the latter may pay to plaintiffs. In default thereof, its surety American Surety Co. shall be held liable." (R. 136).

In view of this holding of the Court, and its judgment confirming that of the lower court as against the petitioner herein for the full amount of the damages awarded to plaintiffs, petitioner herein filed a motion on July 7, 1969 to have the judgment reconsidered or clarified so that petitioner's liability be expressly limited to the full amount of its policy, namely $50,000.00, since "it would offend the most basic sense of justice to compel appellant to pay approximately half a million dollars for the negligent acts of the subcontractor when it only insured up to $50,000." (App. 61a, 63a).

In its reply brief on reconsideration, dated October 15, 1969, the petitioner herein expressly forewarned the Court of the violation of the due process clause of the Federal Constitution if it were held liable to plaintiffs for all of the damages in open disregard of the stipulated limits of liability and terms of the bond. That part of said brief reads as follows:

> "If this Court would arbitrarily ignore the terms of appellant's bond and would, in addition, order it to pay to whom it never was bound, appellant would be deprived of its property without due process of law, in violation of the National Constitution and the Constitution of the Commonwealth of Puerto Rico."

> "Since we do not assume nor should anticipate what has been previously stated, therefore we did not expressly criticize the opinion of this Court in our motion but merely requested the reconsideration of the judgment for the purposes of

clarifying that appellant's liability was limited to the sum of $50,000 fixed in its policy." (R. 163-164).

After several of the parties had submitted their briefs on reconsideration, and oral argument was heard (R. 171), on April 24, 1970 the Supreme Court denied petitioner's motion for reconsideration, without opinion. (App. 66a). Thereafter, on May 4, 1970 the petitioner moved to have the mandate of the Court returned and withheld pending the filing of this petition before this Hon. Court, stating as follows:

"In the petition for certiorari before the Supreme Court of the United States appellant shall contend that the judgment rendered in this case is unconstitutional because it deprives appellant of its property without due process of law, in violation of Amendments Nos. 5 and 14 of the Constitution of the United States, since it orders it to pay to plaintiffs-appellees great amounts of money in excess of the amount it agreed to pay under the liability policy for the negligent acts of codefendant Island Constructors, Inc., without there being any ground in the evidence presented in this case to extend appellant's liability towards the plaintiffs, the judgment, constituting in that manner an arbitrary and whimsical forfeiture of the property of appellant, as it appears in more detail in appellant's briefs filed in this case." (R. 173-174).

It should become apparent from the aforestated facts and proceedings in this case that petitioner herein had no reason to anticipate the necessity of raising Federal constitutional issues before it did so in the proceedings for rehearing (reconsideration) or in its motion for the return and withholding of the mandate pending this petition for certiorari before this Court. It was not until after judgment of the Supreme Court of Puerto Rico that petitioner had any reason to invoke the protection of the Federal Constitution, for it was

precisely that judgment which furnished the basis to do so. In circumstances perhaps not as strong as the ones herein, this Court has held that constitutional issues have been timely raised for its consideration. *Great Northern R. Co.* v. *Sunburst Oil & Ref. Co.*, 287 U.S. 358, 77 L. Ed. 360 (1932); *Brinkerhoff-Faris Trust & Sav. Co. Hill*, 281 U.S. 673, 74 L. Ed. 1107 (1930); *Missouri ex rel Missouri Ins. Co.* v. *Gehner*, 281 U.S. 313, 74 L. Ed. 870 (1930); *Saunders* v. *Shaw*, 244 U.S. 317, 61 L. Ed. 1163 (1917).

REASONS FOR ALLOWANCE OF WRIT

As we have seen the Supreme Court of Puerto Rico definitely concluded that all of the damages to plaintiffs properties were solely caused by the negligence of the subcontractor in having deficiently operated on March 30, 1957 a test of a system of well points for the purposes of extracting the water from the subsoil in the area of the project. It was also held that these damages were covered under petitioner's liability policy.[4] Undeniably this policy stipulates an aggregate limit of liability of $50,000.00.

The only other facts in the record relating to petitioner's relationship with the parties or actions with respect to the project are the following. Petitioner had issued a performance bond for the exclusive benefit of the principal contractor (Nolla, Galib & Co.) guaranteeing performance by the subcontractor of its subcontract with the former for the storm sewer involved in this case. Several months after the subcontractor had performed the damaging pumping test, it discontinued the work and the principal contractor filed suit for specific performance and mandatory injunction to com-

[4] This policy was obtained pursuant to the provisions of section 6 of the subcontract (R. 190-191).

pel the subcontractor and or petitioner, as its surety, to continue with the work. On December 4, 1957 a stipulation was entered into in said suit by virtue of which it was agreed that the work would be continued by the subcontractor or the petitioner without waiving any of their rights or acknowledging an obligation to continue the work.[5] On December 17, 1957 the subcontractor declared itself in default. (R. 199). On January 8, 1958 petitioner through its attorney wrote to the principal contractor advising the latter that it had contracted with a third party for the completion of the work and that "It was expressly understood that any expenditures made by the surety company in the performance of the contract in excess of the amounts it receives from you under the contract shall in no way be considered to modify or change the terms and conditions of the bond dated February 18, 1957 executed by the American Surety Company of New York." (R. 201). Subsequently the work was completed by the said other contractor for the petitioner.

It is obvious from the opinion of the Supreme Court of Puerto Rico that it did not hold petitioner liable to plaintiffs under its performance bond[6] nor against the

[5] The main pleadings and the stipulation in this suit appear in the Record at pp. 226-250.

[6] The Court could hardly have held petitioner liable to plaintiffs or the municipality under the performance bond, for the bond clearly states: "No right of action shall accrue under this bond to or for the use of any person or corporation other than the Owner named herein (Nolla, Galib & Co.) or the heirs, executors, administrators or successors of Owner." (R. 195-196). As a matter of fact, the plaintiffs did not even assert a claim against petitioner under the bond in their complaints. Neither did the aforestated beneficiary of said bond, who in any event was exhonerated from liability to plaintiffs, and therefore had no grounds for indemnity against petitioner or the subcontractor. See also *Ferrer* v. *Alliance Co. of P. R., Inc.*, 93 PRR 1 (1966).

subcontractor under the construction contract provisions relating to the legal responsibility of the principal contractor with respect to the restoration of damaged properties,[7] for, as we have seen hereinbefore, the Court expressly stated that it did not have to consider these matters. Consequently any question regarding the limits of petitioner's liability under the performance bond also became immaterial.

Furthermore, the record does not contain a *scintilla* of evidence upon which it may be held that petitioner assumed any responsibility towards the plaintiffs or the municipality for the damages caused by the negligence of the subcontractor, other than the liability policy. It seems to us inconceivable, even with the unjustifiable persuasion of having an insurance company as defendant, that it can be held that petitioner assumed the obligation of paying for the damages previously caused to third parties by the negligent acts of the subcontractor, simply because petitioner several months thereafter agreed with its sole obligee, the principal contractor, to complete the storm sewer.[8] In having so held the commonwealth court committed a gross and obvious error, exceeding the boundary of arbitrary action and constituting a naked taking of petitioner's property without due process of law, in support of which we refer to the authorities hereinafter cited.

[7] See section 7.10 of the General Conditions of the construction contract, entitled "Legal Relations and Responsibility to the Public". (R. 175, 181-183). Needless to say there was not even any contractual relationship between the municipality and the subcontractor.

[8] As we have seen, even when dealing with its only obligee regarding the completion of the work, it advised the latter that it was circumscribing itself to the terms and conditions of the bond, which expressly gave to the surety the option of completing the work. The bond appears in the record at pages 194-197.

Otherwise we are faced with the bare proposition of a liability insurer being held liable for more than it contracted to pay under its insurance contract.

It has been held that the due process clause of the Fifth or Fourteenth Amendments applies to the Commonwealth of Puerto Rico and that it is unnecessary to decide which of those Amendments is the one applicable to Puerto Rico under its "Commonwealth" status; "the important point is that there cannot exist under the American flag any governmental authority untrammeled by the requirements of due process of law as guaranteed by the Constitution of the United States." *Mora v. Mojias*, 1 Cir., 1953, 206 F. 2d 377, 382; *Figueroa Ruiz v. Delgado*, 1 Cir., 1966, 359 F. 2d 718; *Fornaris v. The Ridge Tool Co.*, 1 Cir., 1970, 423 F. 2d 563. See also *Balzac v. People of Puerto Rico*, 1922 258 U.S. 298, 312-313; 66 L. Ed. 627.

The due process clause of both Amendments provides that no person shall be deprived of life, liberty or property without due process of law.[9] This constitutional prohibition has been held applicable to the courts as well as the legislative and executive branches of the government. See *Ex parte Virginia*, 100 U.S. 339, 347, 25 L. Ed. 676 (1879); *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 233-235, 41 L. Ed. 979 (1896); *Scott v. McNeal*, 154 U.S. 34, 38 L. Ed. 896 (1893). Of course, mere error or mistake on the part of a court in a judgment does not constitute denial of due process.

[9] There is no substantial reason why property rights should not deserve equal consideration as those of life and liberty with which they were placed indistinguishably for protection in the Constitution, for it is not difficult to realize that life nor liberty can become meaningful if the means of livelihood and independence, namely property, are left to the mercy of governmental action.

Chicago Life Ins. Co. v. *Cherry*, 244 U.S. 25, 61 L. Ed. 966 (1916); *Herbert* v. *Louisiana*, 272 U.S. 312, 71 L. Ed. 270 (1926). But if the error is gross and obvious, "coming close to the boundary of arbitrary action", the judgment will be held to violate the due process clause. *Roberts* v. *New York*, 295 U.S. 264, 277, 79 L. Ed. 1429, 1435 (1934).

It should also become manifest that a judgment holding an insurer liable for more than it contracted to pay under its liability insurance contract, without any foundation in fact or colour of law,[10] constitutes a grossly arbitrary deprivation of property without due process of law, by sheer judicial fiat. Had this been attempted by the legislature, the statute would have been unconstitutional, for "legislation which deprives one of the benefit of a contract, or adds new duties or obligations thereto, necessarily impairs the obligation of the contract, and when the state or municipal legislation has the effect to impair contract rights by depriving the parties of their benefits, and makes requirements which the contract did not theretofore impose upon them, a case is presented for the jurisdiction of this court." *Northern P. R. Co.* v. *Minnesota*, 208 U.S. 583, 591, 52 L. Ed. 630, 634 (1907). See also *Hartford A. & I. Co.* v. *Delta & Pine Land Co.*, 292 U.S. 143, 78 L. Ed. 1178 (1934); *International Steel & Iron Co.* v. *National Surety Co.*, 297 U.S. 657, 80 L. Ed. 961 (1936); *Fornaris* v. *The Ridge Tool Co.*, supra; Cf. *Mora* v. *Mejias*, 223 F. 2d 814 (1st Cir. 1955).

Obviously the constitutional restrictions on governmental action cannot be subjected to a double standard,

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[10] See art. 20.030 of the Insurance Code of P. R., 26 LPRA Sec. 2003, and *U. S. Fidelity & Guaranty Co.* v. *Superior Court*, 85 PRR 124 (1962).

one for the courts, and another for the legislative or the executive branches. *Chicago, B. & Q. R. Co.* v. *Chicago;* 166 U.S. 226, 234-235, 41 L. Ed. 976 (1896). Arbitrary deprivation of constitutional rights by courts should be severely condemned, for it is the judicial branch of government which has been specially designated for and entrusted with the protection of those rights.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

IN THE SUPERIOR COURT OF PUERTO RICO
SAN JUAN SECTION

Civil No. 57-5461

DAMAGES

RAMONITA BARRIENTOS, *Plaintiff*

v.

GOVERNMENT OF THE CAPITAL, ET AL., *Defendants*

Statement of the Case, Proven Facts, and Conclusions of Law

In connection with the construction of the works of storm-water sewerage for the sector of Ocean Park, in Santurce, the plaintiffs have filed complaints claiming damages sustained as a result of the execution of the works. Several cases [1] have been consolidated and submitted to the court

[1] The cases which were consolidated are the following:

Joaquín Valdivieso	57-2067
Ramonita Barrientos	57-5461
César Maldonado	57-5720
Victoriano M. Fernández	57-5802
Guillermo Ríos	57-6030
Carmen J. Martínez	57-6060
Irving Fox	57-6355
Eugene R. Hanson	57-5903
Alfonso Ortiz	57-5904
Dolores Muñiz	57-5929
Mariana Green	57-2567
Antonio J. Salib	57-6366
José Sánchez Parra	58-1880
Monsita Casiano de Aja	58-505
Frank Salgado	58-1873
Jerónimo Ruiz	58-406
Agustín Correa	58-3375
Angel Lebrón	58-1874
Ana P. Vda. Villamil	58-123
María Ramona Pérez	58-404

for decision, insofar as the controversy concerning the civil liability for personal damages sustained is concerned, since it was stipulated[2] that everything concerning the damages to the buildings of the defendants will be submitted to the master who will be appointed in due time.

The defendants are all the neighbors owners of buildings in the sector where the works are carried out, and principally in Cacique and McLeary Streets. The following entities appear as principal defendants:[3] the Government of the Capital, to which we shall refer as "Municipality"; civil partnership Nolla, Galib & Compañía, which we shall indistinctly call "Nolla and Galib," or the "contractor"; the domestic corporation Island Constructors, Inc., which we shall designate as "Island" and the "subcontractor"; and the surety companies American Surety Co.,[4] and United

Suen. José Miranda González	58-1872
Pedro Orpi	58-2632
Federico Barela	59-655
José Malgor Méndez	58-725
Suen. Germán Fernández López	58-613
José Fernández, et al.	59-6736
Marta Dalmau	59-6485
Jaime Canellas	59-8444
Luis F. Sánchez Vilella	58-5481
Jorge L. Roberts	59-2787
Ida Rivera Vda. Gaetán	58-6765
Antonio Quiñones Bird	58-6173

[2] See, written stipulation of May 27, 1959.

[3] In the action initiated by Irving Fox, Civil No. Cs-57-6355, Pedro J. Tejada and P. J. Tejada & Associates were included as defendants. In the course of the hearing of the case a petition for non suit was granted and the complaint was dismissed insofar as Pedro J. Tejada was concerned.

[4] In some complaints, Inter American Insurance Co., which is the local agency which represents the American Surety Co., was included by error as defendant, but it was stipulated that in such case it should be understood that the latter was included as defendant.

States Casualty Co. At the hearing[5] the parties stipulated that the allegations to which we shall refer hereinafter should be understood as uniformly presented in all the cases which were consolidated: 1.—Complaint; 2.—Answers of the Government of the Capital; Nolla, Galib & Compañía and its insurer, United States Casualty Co.; Island Constructors, Inc. and its insurer, American Surety Co.; 3.—Claim against coparties filed by Nolla, Galib & Compañía against the Government of the Capital and Island Constructors, Inc.; 5.—Claim against coparties filed by Island Constructors, Inc. against the Government of the Capital and Nolla, Galib & Compañía; 6.—Answers to these three claims against coparties; 7.—Third-party complaint of Island Constructors, Inc. against Gabriel Fuentes; and 8.—Answer of third-party defendant, Gabriel Fuentes.

The hearing of the case was held on May 27 and 28, June 2, 3, 4, and 8, September 22, 23, 24, 29, and 30, and October 1, 6, 7, and 8, 1959, during which the parties introduced oral and documentary evidence. At the close of the trial the parties were granted a term to file brief in support of their respective contentions. Only codefendants Island Constructors, Inc. and American Surety Co. filed theirs.

Considering the extensive evidence, the diversity and importance of the questions of law which appeared, the absence of briefs, with the exception already indicated, the court requested all the parties to submit proposed findings of fact and conclusions of law, which were submitted, the last one on the past June 2.

In view of the result of the allegations, the written and oral stipulations of the parties, and the oral and documentary evidence introduced, the court finds proved the following

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[5] Session of September 22, 1959.

Facts

For the purposes of settling the problem created by the frequent floods in Ocean Park, Santurce, Puerto Rico, which caused inconveniences and losses to the residents of that section, the Municipality ordered that studies be made to determine the causes and recommend the proper solution to same. These studies were performed by the professional firm P. J. Tejada & Associates, which, for that concerning the nature and conditions of the subsoil, utilized the services of Foundation Engineering Co. of Puerto Rico, and specifically of Engineer José L. Capacete.

2. As a result of the studies carried out, the construction of a new storm-water sewerage system with a greater capacity than the existing one, and of a pumping station to displace the rainfall towards the nearby ocean, was recommended. For that purpose, P. J. Tejada & Associates, prepared the corresponding drawings and specifications which contained general bidding conditions which are incorporated to every construction project of public works, and further, special conditions which refer to the specific works which is to be performed. Among the information furnished to the bidders, there was that concerning the studies of the subsoil,[6] which showed eleven borings made in McLeary, Cacique, and Santa Ana Streets, in their intersections with Gertrudis, Santa Secilia, San Miguel, and San Gabriel Streets, and the distance from the surface of the streets at which the water table is found in that section. In the drawings reference was made to the fact that the studies of the subsoil had been performed by the said professional firm.

3. In general terms the project required the installation of a pipeline for the storm-water sewerage along the south boundary of Cacique Street from its intersection with

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[6] Page No. 3 of the Drawings (Exh. 1-A of all the parties).

Santa Ana Street, up to the intersection with Tapia Street, and in the north boundary of McLeary Street, from its intersection with Atlantic Street, up to its intersection with Santa Ana Street. It also included pipeline in Santa Ana, Santa Cecilia, San Miguel, Tapia, and Monsita Streets, as well as the construction of gathering lines at the intersections of Cacique and Tapia Streets, Cacique and San Miguel, Cacique and Santa Cecilia, Monsita and San Miguel Streets, and two at McLeary Street. The pumping station is located at the intersection of Cacique and Santa Ana Streets, and the piping for the discharge of the waters towards the sea was installed along the west boundary of Santa Ana Street. In the specifications it was required that the installataion of this piping be made on dry, by pumping or otherwise, but it did not prescribe a specific method therefor.

4. After the auction [7] was held, the contract for the construction of the works was adjudicated to Nolla, Galib & Compañía, for the sum of $433,241.48, and the contract was signed on January 17, 1957.[8] On February 18, 1957,[9] Nolla and Galib subcontracted with Island the execution of the part of the contract concerning the construction of the works for the installation of the storm-water sewerage for the total amount of $199,322.60 and they reserved for themselves the construction of the pumping station. By virtue of the subcontract to which we have referred, which was approved and consented to by the Municipality,[9a] Island assumed all the obligations which Nolla & Galib had agreed with the Municipality with respect to the installation and

[7] Island Constructors, Inc., attended the auction as a bidder.

[8] Exh. 1 of all the parties.

[9] Exh. 2 of all the parties.

[9a] Exhibit 10 of all the parties, which is a letter of July 3, 1957, sent by Engineer Pedro J. Tejada to Nolla & Galib.

construction of the storm-water sewerage.[10] In the works for the construction of the pumping station, Nolla & Galib subcontracted the Gabriel Enentes the driving of the sheet-piling. The Municipality supervised the works through the firm P. J. Tejada & Associates.[10a]

5. In connection with the contract and subcontracts to which reference has been made in the third preceding paragraph, the following bonds and policies, whose pertinent

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[10] The pertinent parts of the subcontract read as follows:

"Section 1. The Subcontractor agrees to furnish all materials, labor and means of construction and to construct complete the following described work in accordance with the conditions and applicable provisions of the above named contract between the Owner and the Contractor and in compliance with the above mentioned drawings and specifications, as may be identified by the Architect, are by reference hereby incorporated in and made a part of this agreement, including all amendments.

"Section 4. The Subcontractor declares that he has thoroughly examined the drawings and specifications governing the work embraced in the above mentioned contract between the Owner and the Contractor, of which the work covered by this agreement is a part, and he hereby agrees to assume toward the Contractor all the obligations and responsibilities which the Contractor has assumed toward the Owner under said Contract between the Owner and the Contractor so far as they apply to the part of the work covered by this agreement.

"Section 6. The Subcontractor shall indemnify and save harmless the Contractor from all claims, demands and judgments for damages arising from accidents, to persons or property occasioned by the Subcontractor, his agents or employees and against all claims, demands and judgments for damages arising from accidents to the Subcontractor, his agents or employees, from whatever cause arising and the Subcontractor shall defend any and all suits brought against the Contractor on account of any such accidents or damages and shall reimburse the Contractor for any expenditure made or costs incurred by reason thereof."

[10a] During the execution of the works the inspectors called the subcontractor's attention to several deficiencies, which were corrected. Exhibit 10 of all the parties concerning the length of the trenches.

provisions for the purposes of the solution of the consolidated cases we copy below, were issued:

a. Bond issued by United States Casualty Co., in favor of the Municipality, to secure the performance well and faithfully, by Nolla & Galib, of its obligations under the contract and its modifications.[11]

b. Bond issued by United States Casualty Co., in favor of the Municipality, to secure the payment by Nolla and Galib of the materials used and labor hired for the performance of the contract and its modifications.[12]

c. Bond No. NR 57-42, issued on February 18, 1957 by American Surety Co. in favor of Nolla and Galib, to secure the performance, well and faithfully, by Island, of its obligations under the subcontract and its modifications,[13] copy of which is attached and made a part as annex "A".

In the application for the issuance of the bond, it is said:[13a]

> "Upon completion of the work provided for in said contract, if the entire amount of the contract price amounts to more than the sum of ———— ($199,322.60) Dollars, said applicants will then pay

[11] Exhibit 1 of all the parties (Part 1—Division V).

[12] Exhibit 1 of all the parties (Part 1—Division VI).

[13] Exhibit 3 of all the parties. Codefendant insists that American Surety Co. is not liable under the terms of this bond, since the cross-claim of Nolla and Galib is directed only against Island. Any omission of the allegations in this sense was amply supplied by the evidence. Rule 13.2 of the Rules of Civil Procedure of 1958, *Arvelo* v. *Román*, 65 P.R.R. 699, *Valencia Service* v. *District Court*, 70 P.R.R. 299. Besides, in order to controvert this allegation, said defendant, American Surety Co., introduced the testimony of Mr. Frederick Carroll.

[13a] Exhibit 1 of Nolla and Galib.

to the Sureties such additional premium as may be due, computed at the rate fixed for the project. If the entire contract price shall be less than ———— ———— ($199,322.60) Dollars, said Sureties will repay to the applicants such portion of the net premium as may have been collected over and above the actual premium earned, computed, at the rate fixed for this project. . . ."

d. Bond No. SM-917268, issued on January 17, 1957 by United States Casualty Co. to save harmless Nolla and Galib from all claims for damages caused by it during the performance of the contract (Contractors liability policy).[14] The liability limitations of the insurer under this policy are $50,000 per person and $100,000 per accident in case of personal damages, and $5,000 for each accident, and $25,000 for total damages, in case of damages to property. The policy defines insured as "the named insured and also includes any partner, executive officer, director or stockholder thereof while acting within the scope of his duties as such," and in the definition of covered risks it includes "operations performed for the named insured by independent contractors and general supervision thereof by the named insured, if the accident occurs in the course of such operation. . . ."

e. Policy No. CLP-222-98660 issued by American Surety Co. in favor of Island Constructors, Inc. and Constructors of Florida, Inc., to save Island harmless from the claims for damages caused by same in the performance of the subcontract.[15] The liability limitations of the insurance company under this policy are, in cases of personal damages, $100,000 per person and

[14] Exhibit 4 of all the parties.

[15] The subcontract of Ocean Park was included in the policy by endorsement dated February 15, 1957.

$200,000 per accident, and in cases of damages to property, $25,000 per person and $50,000 per accident.

Upon defining the risks covered by the policy it is stated that the company shall be liable in cases for damages to the person or to the property caused by accident. Specifically, as to damages to the property, the damages to property arising from "The collapse of or structural injury to any building or structure due (a) to excavation, including borrowing [*sic*] filling or backfilling in connection therewith, or to tunneling, pile driving, coffer-dam work or caison work, or (b) to moving shoring, underpinning, raising or demolition of any building. . . ."

6. The contract for the construction of the works of the storm-water sewerage and the pumping station in Ocean Park contains, among others, the following conditions, which we deem it advisable to copy:

a) "General Conditions—2.3, Examinations of Plans, Specifications and Site of Work—The bidder is required to examine carefully the site of the work and to familiarize himself with the conditions which will be encountered, and with the character, extent, quality and quantity of work or services to be performed and materials to be furnished. The bidder shall examine carefully the plans, specifications, special provisions, proposal form, contract form and all documents pertaining thereto. The filling of a proposal by a bidder will be presumptive evidence that he has complied with all these requirements.

Borings, topographical data, water elevations, etc., if shown on the plans were obtained for use of the Capital of Puerto Rico in the preparation of the plans for the work, and the bidder is hereby cautioned that the Capital of Puerto Rico assumes no responsibility for the accuracy of these data. The bidder in preparing his proposal shall take cognizance of

the difficulty of accurately classifying all materials encountered in making investigations, the possible erosion of stream channels and banks after survey data have been obtained, and the unrealiability of water elevations other than for the data record.

"2-5 Wherever necessary, and when directed by the Capital of Puerto Rico, the Contractor shall provide, set and maintain adequate shoring and sheetpiling to support the side of all excavations. The sheet piling and timbering shall be removed as backfilling is done. No allowance will be made for this or any other sheathing or bracing used in making excavations, over the prices bid for excavation."

"4-10 All excavations shall be by open cut from the surface. No tunneling will be allowed except by written permission of the Capital of Puerto Rico. The trench shall be excavated to conform as nearly as possible to the shape of the lower half of the pipe, which has an uniform bearing on the ground along its entire lengths. In case a trench is excavated below the proper grade, it shall be refilled to the proper grade with sand thoroughly rammed."

"4-11 The sides of the trenches shall be kept vertical by bracing, sheathing, shoring or sheet piling, if necessary. No allowance for sheet piling or sheathing left will be made. When left in the trench the sheathing or sheet piling shall be cut off 12 inches below the surface."

"4-13 The trenches shall be kept free from water by pumping or otherwise, as no pipe or masonry shall be laid in water, and kept dry until joint material has hardened."

b) General Conditions—5:1, Control of the Work Authority of the Director.—The Director shall decide all questions which may arise as to the quality or

acceptability of materials furnished and work performed, the manner of performance and rate of progress of the work, the interpretations of the plans and specifications and the acceptable fulfillment of the contract on the part of the contractor. His decision shall be final and he shall have executive authority to enforce such decisions and orders as the contractor fails to carry out properly and promptly. This authority may be delegated at the discretion of the director.

c) General Conditions—5.2, Plans and Working Drawings.—The contractor shall furnish necessary working and details drawings which shall be approved by the Director before any work involved in them is started, but such approval shall not relieve the contractor of any of this responsibility under the contract and of the responsibility for the satisfactory completion of the improvement. Any material order prior to the approval of such plans shall be at the Contractor's risk. No deviation from said approved plans will be allowed without the Director's written consent. . . ."

d) General Conditions—7.10, Protection and Restoration of Property. . . . When or where any direct or indirect damage or injury is done to public or private property by or on account of any act, omission, neglect or misconduct in the execution of the work, or in consequence of the non-execution thereof on the part of the contractor, such property shall be restored by or for the contractor and at the contractor's expense to a condition similar or equal to that existing before such damage or injury was done, by repairing, rebuilding or otherwise restoring the same, or he shall make good such damage or injury in a manner acceptable to the responsible parties and to the satisfaction of the Engineer.

e) General Conditions—7.11, Responsibility for Damage Claims.—The contractor shall save harmless the Capital of Puerto Rico and all its officials, representatives and agents from all suits, actions, or claims of any character brought on account of any injuries or damages received or sustained by any person, persons, or property through the acts of the contractor, his agents or servants, or by or in consequence of any neglect on the part of the contractor, or his agents or servants, in safeguarding the work, or through the use of inacceptable materials in the construction of the work; or by or on account of any claims or amounts recovered for any infringement of patent, trademark or copyright, and for any claims or amount arising from or recoverable under the Workmen's Compensation laws or any other laws, ordinances, by-laws, orders or decrees. The contractor shall be responsible for all damage or injury to property or any character during the prosecution of the work resulting from any act, omission, neglect or misconduct in the manner or method of executing said work or due to the non-execution of said work at any time, or due to defective work or materials, and such responsibility shall continue until the work has been completed and accepted by the Director.

f) Excavation, Filling and Grading—2-3, Site Conditions:—The Capital of Puerto Rico assumes that the contractor has visited the site and has become acquainted with existing ground conditions. Failure to do so shall not relieve him from responsibility for all requirements of the contract.

g) Excavation, Filling and Grading, Shoring and Sheet Piling—2.5—Wherever necessary, and when directed by the Capital of Puerto Rico, the Contractor shall provide, set and maintain adequate shoring and sheet piling to support the sides of all excavations. The

sheet piling and timbering shall be removed as backfilling is done. No allowance will be made for this or any other sheathing or bracing used in making excavations, over the prices bid for excavations.

h) Subsoil Conditions, Piping and Manholes—4.11—The sides of the trenches shall be kept vertical, by bracing, sheathing, shoring or sheet piling, if necessary. No allowance for sheet piling or sheathing left in the trench will be made. When left in the trench the sheathing or sheet piling shall be cut off 12 inches below the surface.

i) Subsoil Conditions, Piping and Manholes—4.13—The trenches shall be kept free from water by pumping or otherwise, as no pipe or masonry shall be laid in water, and kept dry until joint material has hardened.

j) Subsoil Conditions, Piping and Manholes—4.14.—In excavating and backfilling trenches, and laying the sewer, care must be taken not to remove or injure any structures without the written order of the Capital of Puerto Rico. If necessary, the Contractor shall, at his own expense, protect, support and or maintain said pipes and structures. Any damage done to structures other than water pipes must be repaired immediately by the Contractor at his own expense.

k) General Notes, Division XII (a): The Contractor shall replace to the original the pavement, base and sub-base, sidewalks and curbs or combinations of curbs and gutters of streets, floors of building or fences affected by the construction of the storm-sewer. . . ."

7. Nolla, Galib & Compañía, civil partnership engaged in the construction of works, is composed by Mr. Miguel J. Nolla, Jacinto Galib, and Joaquín Márquez, Jr. None of them is or has been shareholder, director or officer of Island Constructors, Inc., which is a domestic corporation whose shareholders and directors were Mr. Jim Lancaster, Mr. Richard R. Reynolds, and Mr. Earl L. Goodwin. Nolla and

Galib did not hire or fire the laborers who worked in the performance of the subcontract, nor had immediate supervision of the work carried out by them. The laborers were paid by the subcontractor, as well as the materials used in connection with the construction and installation of the storm-water sewerage. The contractor did not have control or intervention on the manner of performing the subcontract, nor as to the method of construction which was utilized. He did not satisfy the quotas of the State Insurance Fund,[16] nor deducted the workers' contributions for the payment of the social security. The contractor did not have control over the progress of the works during the performance of the subcontract.

8. On December 17, 1957 the subcontractor abandoned the performance of the subcontract because one of the plaintiffs obtained order of attachment of the funds which Nolla and Galib had in its possession to pay the certifications of Island. Nolla and Galib[17] instituted an action against Island and American Surety Co.,[18] so that they be ordered to continue the works, and finally, the latter stipulated that it will continue same and therefor[19] utilized the services of

[16] The contractor had paid to the State Insurance Fund the amount of $1,332.42, but the subcontractor bound itself to reimburse same. (Exhibit 2 of all the parties.)

[17] Exhibit B of American Surety Co. (Attachment proceedings in civil case 57-2067 of the Superior Court of San Juan).

[18] Exhibit A of American Surety Co. (Record 57-6515 of the Superior Court of San Juan).

[19] The pertinent part of the stipulation of the parties, of December 4, 1957 (Exh. G. of Nolla and Galib), reads as follows:

> "Island Constructors, Inc. and/or American Surety Inc. will continue the works of the construction of the storm-water sewerage of Ocean Park until their termination, in accordance with the contract signed by the parties on February 18, 1957, marked Exh. 'A' of plaintiff."

See also Nolla and Galib's Exh. J.

Harbert Construction Corporation, through the affiliated company,[20] Constructors & Engineers of Puerto Rico. This firm continued the works in December 1957, until recent date.

Since December 1957, the American Surety Co. has disbursed the sum of $220,447.53 for the termination of the performance of the subcontract. Nolla and Galib had made payments of certifications submitted by Island and American Surety for a total of $111,065.48. From the balance of the price of the subcontract, plaintiff Joaquín Valdivieso attached the amount of $25,000, which is deposited subject to the result of this suit.

9. The works required for the construction of the storm water sewerage and the pumping station were not essentially or inherently dangerous, since it was a question of engineering works which are currently carried out. They did not require, either, to take extraordinary precautions to avoid damages, since by using *in the proper manner* any acceptable method to extract the water from the soil, damages to the neighboring structures could not be foreseeing. The performance of the works did not presuppose that damages would be caused to third parties, that is, that the work, because of its very nature, did not have to cause or produce risks or damages.

10. On Saturday, March 30, 1957, the subcontractor, without notice to the contractor or Municipality, or its supervisors, performed a test of a well points system which he had installed for the purposes of extracting the water from the subsoil in order to dry the trenches where the piping would be installed on dry as required in the contract. The well points method[21] is one accepted for this kind of operation and has been used in other works in Puerto Rico. In

[20] Exhibit J of Nolla and Galib.

[21] The purpose of this requirement is to ascertain that the joints of the pipes of the sewerage would consolidate in a safe and proper manner.

choosing same, neither the Municipality nor the contractor intervened, since the selection of the method is usually done by the person who executes the works.

The evidence lasted approximately between two and four hours.

In order to carry out the test, the subcontractor had installed a line of about one hundred twenty well points, at a depth of approximately ten feet, alonp Cacique Street, from its intersection at Santa Ana Street, to its intersection with Santa Cecilia Street. Sheet piles were not placed along this line, except four or five near Santa Ana Street, at the place where the pump was operated. The well points were placed out of the sheet piles.[22]

As a consequence of the test performed, a disturbance was occasioned in the subsoil when the water table of the sector was lowered. This descent of the water table caused a settlement in the area from where the water was extracted. As a result of this settlement of the soil, immediate visible damages in the neighborhood were caused, such as cracks in sidewalks, walls, and fences and the sinking of floors. The radius of action of the disturbance in the subsoil was about 1,000 feet, that is, it also affected the area facing McLeary Street. This initial pumping produced a disturbance in the subsoil of such a nature that the process of consolidation shall take a long period. On the other hand, when the water was subsequently extracted by the pumping method from the open trench and due to the situation provoked in the subsoil by the initial pumping, the latent damages were produced, as a result of the consolidation cycle and the alteration of the peaty material which is not recovered or reabsorbed by the extracted water. Hence, in some cases the cracks, the sinking of floors, and others, were observed when the works were performed in the area near th structur affectd, and even after those works

[22] Exhibits A-1, A-2, and A-3 of the Government of the Capital.

were stopped.[23] We wish to state that we give full credit to the testimony of the expert José L. Capacete, as to the nature, cause, and effect of the disturbance occurred in the subsoil as a result of the facts to which we have referred.

The subcontractor did not anticipate that the test of the extraction of water through the system of well points would cause damages.

11.[24] After the test of March 30 was performed and considering the prejudicial results caused, the subcontractor, following instructions of the inspectors of the Municipality, suspended the works on April 2 and addressed in writing the contractor informing him about the situation.[25] The contractor transmitted the letter to the Municipality,[26] which on April 8 ordered that the works be continued "with the method indicated in the same specifications."[27] The subcontractor, following instructions of American Surety Co., which had the confiscation of the bond, continued the works.

Subsequently, the contractor suggested an alternating method for the installation of the pipes which consisted of raising four feet the level at which they were to be placed, backfilling with stones the bed where the pipes would rest,

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[23] See complementary complaint filed by Joaquín Valdivieso Llompart.

[24] See Exh. 6 of all the parties (Letters of April 3 sent by Island to Nolla and Galib).

[25] Exhibit 6 of all the parties (Letter of April 3, 1957 sent by Island to Nolla and Galib). It is significant that in this letter the subcontractor requested that the change in method be considered as a change order to the contract, and as such, subject to compensation as additional work.

[26] Exhibit 7 of all the parties (letter of April 4, 1957, sent by Nolla & Galib to P. J. Tejada & Associates).

[27] Exhibits 8 of all the parties (letter of the Municipality to Nolla & Galib of April 8, 1957).

placing wood sheet piling and open pumping from the excavation. The contractor[28] transmitted this suggestion to the Municipality, and upon being substantially accepted by the latter,[29] the corresponding modification to the contract was signed on May 7, 1957.[30]

In the continuation of the works the subcontractor discontinued the use of the well points, and extracted the water by pumping from open trench, that is, once the excavation was open and the earth removed, the water was taken out by the use of pumps. This excavation was laterally protected with wood sheet piles.

12. Nolla & Galib constructed the station where the pumps which drive the rainfall gathered in the pipes of the sewerage towards the sea are found.[31] For the construction of this station an excavation of more than forty feet was made at intersection of Cacique and Santa Ana Streets. Steel sheetpiling was driven at a depth of about forty feet in a circular area, and in effect, a steel coffer-dam was constructed. During the work of pumping water from the excavation, piezometers were installed in the vicinity of the works and the reading thereof determined that the descent of the table water outside the sheetpiling was not, at any time, greater than one foot. For the driving of the sheet piles a Vulcan No. 1 hammer of 5,000 pounds was used,

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[28] Exhibit B of the Municipality (letter of April 11, 1957, sent by Island to Nolla & Galib).

[29] Exhibit C of the Municipality (letter of April 23, 1957, sent by P. J. Tejada to Nolla & Galib).

[30] Exhibit D of the Municipality.

[31] Nolla & Galib ordered the preparation of technical reports concerning the manner of avoiding that the extraction of the water from the subsoil would lower the water table in such a manner as to produce damages. For that purpose it contracted the services of Puerto Rico Testing Services, Inc. (Exh. 8 of Nolla & Galib), and of Foundation Engineering Company of Puerto Rico, Inc. (Exh. C of Nolla & Galib).

which hammer produced vibrations whose radius of action did not exceed forty feet, that is, the depth of the sheet-piling. These vibrations of the hammer did not cause damages to the neighboring properties, which were all of them beyond the indicated radius.

13. The settlement of the land would not have produced damages to the neighboring structures if the latter had been built according to the accepted methods in engineering for subsoil of the type existing in Ocean Park. The evidence showed that the houses built on piles—to support the weight of the walls and floors—did not sustain considerable damages.

ADDITIONAL FINDINGS OF FACT IN CIVIL CASE NO. CS-57-5461
(Ramonita Barrientos)

1. Plaintiff Ramonita Barrientos is the owner by way of private title of the immovable located at 2010 Cacique Street, corner with San Miguel. At the time of the occurrence she was married to Gustavo Herrera, but was separated from him since she abandoned the marital domicile in New York.

2. The structure to which we have referred was built in 1948, at an approximate cost of $9,000.00, and since then the owner has devoted it for rent. In June 1957, Pedro Delgado was occupying it by way of the payment of a monthly rent of $105.00, but he vacated[1] it on July 16, 1959, because as a result of the works performed for the installation of the storm-water sewerage, the floor sank and the walls and columns cracked. Since that date it is uninhabited.

3. The floor of said structure is not built on foundation piles.

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[1] Exhibit 4—Ramonita Barrientos.

[2] Exhibit 5—Ramonita Barrientos.

Additional Findings of Fact in Civil Case No. CS-50-2067 (Joaquín Valdivieso)

1. Plaintiff Joaquín Valdivieso Llompart is the owner of the immovable situate at 1952 Cacique Street, where he resided with his wife, Adolfina Aguero, until August 8, 1959, when he had to move as a result of the damages caused to the house, which rendered same uninhabitable. At the present time he lives at the Gallardo Apartments and pays a monthly rent of $130.

2. As a result of the works the floors of his house sank, and finally collapsed, the walls and ceiling have cracked and the outside fence fell down. The sidewalk in front of his residence was occupied for some time (10 days) by the pipes which were used for the sewerage system. In the excavation for the trenches for placing the pipes the water backed up.

Additional Findings of Fact in Civil Case No. CS-57-6060 (Josefina Martinez Cancel)

1. Plaintiff Josefina Martinez Cancel is the owner of the house located at 51 María Moczó (Santa Ana) Street.

Additional Finding of Fact in Civil Case Case No. CS-57-6355 (Irving Fox)

1. Spouses Irving Fox and Ina Moll are the owners of the house situate at 1960 Cacique Street, where they reside since 1946. As a result of the installation of the piping of the sewerage, the entrance to the garage was obstructed and their house has been cracked and the floors have got in such a manner out of level that when there is heavy rainfall the same is inundated.

Additional Finding of Fact in Civil Case No. 57-6030 (Guillermo E. Ríos)

1. Júlia Rodríquez, Widow of Ríos and her sons, Guillermo and Edwin, are the owners of the house located at 2002 Cacique Street. At the end of 1957 they had leased it for

a monthly rent of $125, but because of the works, the tenant, Victor Figueroa, vacated it by the end of October 1957. They leased it again in December of the same year for a monthly rent of . . .

Additional Finding of Fact in Civil Case No. 57-5720 (Cesar Maldonado)

1. Plaintiff César Maldonado is the owner of the house located at 1962 Cacique Street. The works caused damages to his house as he could see upon his return from a trip to Venezuela, and at present when there is heavy rainfall, it becomes inundated and the water covers as high as 18 inches within the rooms.

2. The building was acquired in February 1947 by plaintiffs for a price of $17,000.00, including the lot. Subsequently, in that year, he built a room of blocks for the domestic service.

Additional Finding of Fact in Civil Case 58-123 (Ana Pérez Villamil)

1. Plaintiff is the owner of the two-story building located at 1950 McLeary Street. She resided in the first floor and leased the second floor for a monthly rent of $100. Plaintiff resided in the house until June 1958, when she moved to another. She pays $95 monthly for rent. She lost part of the furniture of the house and her personal furnishings, but from the evidence introduced it cannot be determined with sufficient certainty what was the total amount of the loss which can be attributed to the construction of the works of the storm-sewerage.

Additional Finding of Fact in Civil Case No. 58-1880 (José Sánchez Parra)

1. As a result of the works for the storm-water sewerage of Ocean Park, plaintiff José Sánchez Parra, owner of the house located at 2000 Cacique Street, sustained

damages in the furniture and equipment of his residence: loss of living and dining room sets, two wardrobes, a refrigerator, and a television set. These damages can be estimated at about $750.00.

Additional Finding of Fact in Civil Case No. 58-406 (Jerónimo Ruiz)

1. Plaintiff is the owner of an immovable situate at the corner of Cacique and Santa Ana Streets, devoted to a coffee shop and soda fountain business known by the name of Marbella. The business consisted mainly in sales served to the people in their automobiles, which they parked on the surroundings of the premises. As a result of the works, access to the premises of the business was obstructed and part thereof was occupied by the piping and other equipment. All this caused a decrease in the benefits which plaintiff usually obtained. From the date stipulated in the contract for the termination of the works (September 19, 1957), until the date when traffic was resumed by that sector (May 21, 1959), the benefits not received by plaintiff Ruiz amounted to $5,034.10.

On the ground of the foregoing findings of fact, the court established the following.

Conclusions of Law

1. The damages caused in the instant case were exclusively due to the initial pumping on Saturday, March 30, during which, although a method which is proper for that kind of work was utilized, its operation was deficient since—considering the nature of the subsoil with which the subcontractor must have been familiarized—the necessary measures were not taken to avoid the damages, and among others, the installation of the well points within the sheetpiling duly sealed and the pumping for a period of time that would avoid the displacement of great amount of water from the subsoil.

The damages which have been noticed subsequently to the initial pumping, and which were manifested during the extraction of the water by pumping from open trench as well as after the said operation ceased, originated as a result of the disturbance brought about in the subsoil by the initial pumping.

The subcontractor and its insurer, American Surety Co., are solely and exclusively liable for these damages.

2. The damages caused were due to an unforeseen and sudden event which was not anticipated by the subcontractor, who did not have the intention, either, of producing such damages. *Kuckenberg* v. *Hartford Accident & Indem. Co.*, 226 F.2d 225. The resulting damage is not the natural and probable consequence which occurs upon carrying out the operation performed by Island Constructors, Inc., *Cutrell* v. *John Hancock Mut. Life Ins. Co.*, 17 N.W. 2d 465.

3. The failure to specify a method for the installation of the sewerage "on dry" does not constitute negligence, since the selection of the method is a matter which corresponds generally and usually to the person who executes the works.

4. The Government of the Capital supervised in an adequate manner the performance of the works, specially if it is considered that the test pumping—efficient cause producing the damages—was carried out without the consent or knowledge of its supervisors during a nonworking day. The supervision contemplated in the contract is not equivalent to an absolute *control* of same, as plaintiffs seem to allege in their effort to hold the Municipality liable, but merely the power to ascertain that the works are executed in conformity with the drawings and specifications. 18 McQuillan Municipal Corporation § 53.76, p. 344. A continuous supervision is not required. *Oklahoma City* v. *Caple*, 105 P.2d 209.

The Municipality did not incur negligence, either, upon ordering that the works be continued. As we have decided, the efficient cause of the damages was the initial pumping.

5. The relationship existing between Nolla, Galib & Compañía, and Island Constructors, Inc., was that of contractor and independent subcontractor, since, as we have found proven, Nolla & Galib did not have any control on the performance of the subcontract, *Atiles* v. *Ind. Commission*, 68 P.R.R. 107, and it only reserved for itself the right to require the final result of the work. 75 A.L.R. 726, 20 A.L.R. 766, 19 A.L.R. 240. Therefore, the contractor is not liable for the damages caused by the subcontractor, specially considering that it was not a question of works inherently dangerous or requiring that extraordinary precautions be taken to avoid causing damages, *Oklahoma City* v. *Caple*, *supra* (construction of a sewer line ditch), *cf. Mariani* v. *Christy*, 73 P.R.R. 729, but rather, it was a question of common engineering works which did not involve apparent dangers in its performance, or which could be anticipated. For that same reason, a nondelegable duty of the contractor or of the Municipality to the public is not involved either; *Sappington* v. *City of Centralia*, 144 S.W. 1112.[31a] On the other hand, it was established that the contractor exercised due care upon selecting as subcontractor an entity of recognized competency and professional experience.

6. The Government of the Capital is not liable either, for any negligent act or omission on the part of Nolla, Galib & Cía., because there exists between them the relationship of principal and independent contractor, and because the works involved were not inherently dangerous and did not require that extraordinary precautions be taken, but it was rather a question of common engineering works which did not involve apparent dangers in their performance, or dangers which could be anticipated. 18 McQuillin, Municipal Corporation, § 53.75 at p. 340.

[31a] In said case, the inherent liability of a municipality in the cases of the use of streets and in the cases of damages to adjoining property is distinguished. If was said: "The city is under no duty or obligation to protect adjoining property against the negligence of a contractor, when the plan of the work is reasonable, and not liable to work injury, if properly carried out."

7. Nolla & Galib y Cia. did not incur any negligent act during the construction of the pumping station, nor did it cause damages to adjoining structures. Gabriel Fuentes did not incur negligent acts either during his participation in the construction of said pumping station.

8. The provisions of the contract called "save harmless clause" (Proven Facts, para. 6(e)), do not hold Nolla & Galib liable for the negligent acts which the Municipality may have incurred, since the clause in question does not expressly provide it thus, nor can it be interpreted in that sense, since it is limited to the damages caused as a result of the acts of the contractor, its agents, and employees. In order that the contractor may be held liable for the negligence of the Municipality or its agents, it is necessary that it be expressly provided thus. *Sinclair Prairie Oil Co.* v. *Thornley*, 127 F.2d 128; *Turner Const. Co.* v. *W. J. Halloran Steel Erect Co.*, 240 F.2d 441; *Broderick* v. *Cauldwell*, 305 N.Y. 872; *Thompson-Starrett Co.* v. *Otis*, 2 N.E.2d 34, 271 N.Y. 36; *McCormick & United States*, 134 F. Supp. 243; *Shamrock Towing Co.* v. *City of New York*, 16 F.2d 199.

A like conclusion must prevail as to Island's liability by virtue of the "save harmless clause" of the subcontract for the negligent acts which might have been incurred by Nolla & Galib.

9. The exclusion contained in policy No. CLP-222-98660 issued by American Surety Co. in favor of Island Constructors, Inc., and which is copied in the Findings of Fact No. 5(e), is not applicable to the instant case, since the damages were not due to the circumstances or events enumerated therein, and specially to the excavations, but [32] to the initial test of extraction of water.

10. It having been determined that Nolla, Galib & Cia. is not liable for the negligent acts of its subcontractor,

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[32] Even though in several complaints it is alleged that the damages were due to the excavations, the allegations should be understood as amended, in order to conform them to the evidence. Rule 13.2 and cases cited in footnote 13.

Island Constructors, Inc., the codefendant United States Casualty Co. is not liable for the damages caused by Island under the clause of policy No. SM-917268 concerning "Independent Contractors" which is copied in Finding of Fact No. 4(d). This clause is not applicable unless a previous determination of the contractor's liability for the subcontractor's acts is made, since it appears, not under the definition of named insured, but under the definition of hazards.

11. When a bond is conditioned to the performance of a contract, the terms of the latter form part thereof and should be jointly interpreted for the purposes of determining its scope and interpretation, *Poisner* v. *Renaud*, 149 A.2d 867, *Gibbs* v. *Trinity Universal Ins. Co.*, 330 P.2d 1035, as well as the specifications which form part of the contract, *American Surety Co.* v. *Brummel*, 484 F.2d 935, *Bekins Moving & Storage Co.* v. *Maryland Casualty Co.*, 244 P.2d 1100. In case of doubt about the interpretation of the bond, the most favorable to the insured or beneficiary should be preferred, *Mass Bonding Ins. Co.* v. *Fentz*, 182 F.2d 752, *Myers* v. *Alla Construction Co.*, 235 P.2d 1, specially when third parties which would be favored by its terms are involved, *Graybar Electric Co.* v. *Continental Cas. Co.*, 142 A.2d 114, and when it is not a gratuitous bond. *American Radiator & Standard Corp.* v. *Forbes*, 259 F.2d 147.

Although ordinarily the liability of an insurance company under a performance bond is limited to the payment of the penalty which appears from the face of the bond issued, *Bill Curphy* v. *Elliot*, 207 F.2d 103, the attendant circumstances in the case at bar show that American Surety Co. assumed an obligation more ample and embracing. Not only did it decide to *terminate* the performance of the subcontract, for which purpose it substituted the company under the bond, Island Constructors, Inc., for all legal purposes, *Ausplund* v. *Aetna Idem. Co.*, 81 Pac. 577, but also the evidence indicates that the amount set forth as

penalty, tantamount to half the total amount of the subcontract, was fixed for the purposes of determining the premium to be accrued, which was subject to increase or decrease depending upon the final cost of the subcontract. It is also significant that American Surety Co. has made disbursements in an amount higher than the penalty sum.

12. On the other hand, the obligation to restore the adjoining properties to the state they had before the performance of the works, which is the fundamental purpose of these suits, is of a contractual origin and was assumed [32a] by Island Constructors by virtue of the terms of the subcontract. Its surety is liable for the fulfillment of this contractual obligation under the terms of the performance bond regardless of whether or not negligence in the performance of the works is established, *Freedman* v. *Hart & Early Co.*, 293 N.Y.S. 525.

Even though the bond was not constituted for the benefit of the plaintiffs, they can bring action as third-person beneficiaries. Section 1209 of the Civil Code, *National City Bank* v. *Guarch*, 50 P.R.R. 847, 852; *Coley* v. *Cohen*, 9 N.Y.S. 2d 503, *Trumphour* v. *Arthur A. Johnson Corp.*, 294 N.Y.S. 575, and particularly, *Anderson* v. *Regroad*, 266 P.2d 320, 325.[32b]

13. Damages for physical suffering and mental anguish sustained on account of loss, destruction, and impairment of property, are not recoverable, *Díaz* v. *Palmer*, 62 P.R.R. 106, particularly when such damages could not be foreseen.

[32a] Findings of Fact, para. 6(d).

[32b] In the opinion of this case it was said: "Where an improvement is made under a contract between a municipality and the contractor making it, by which the contractor assumes liability for all damages to buildings or other property resulting from the work of constructing the improvement, such contract is to be regarded as for the benefit of an injured property owner who may maintain an action, and if the facts warrant recover on such contract."

On the other hand, when in an action claim is made for total loss of a property, it is not proper, in addition to the value of the loss, to recover compensation for the products, rents or services which the property failed to produce. *Rodríguez* v. *Martínez*, 55 P.R.R. 56, *Colón* v. *Shell Co.*, 55 P.R.R. 575, *Torres* v. *González*, 68 P.R.R. 43.[33]

The mere fact of sustaining damages does not entitle to compensation. The party claiming damages should place the court in a condition to estimate the amount thereof, mere general statements, without receipts with respect to the value of the property claimed or corroboration to that effect not being sufficient therefor. *Sánchez* v. *Cooperativa Azucarera*, 66 P.R.R. 330, *Boria* v. *The Maryland Casualty Co.*, 60 P.R.R. 808, *García* v. *Fernández*, 52 P.R.R. 176.

Judgment shall be rendered in conformity with the foregoing findings of fact and conclusions of law.

Let it be notified.

Given in San Juan, Puerto Rico, July 29, 1960.

LUIS R. POLO
Judge

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[33] To this respect we decide that in those cases where the evidence under the consideration of the master shows that the property has been completely lost, damages shall not be granted to plaintiff for failure to receive rents.

COMMONWEALTH OF PUERTO RICO
GENERAL COURT OF JUSTICE
SUPERIOR COURT, SAN JUAN PART

	Civil Cases Nos.:
Joaquin Valdivieso	57-2067
Ramonita Barrientos	57-5461
César Maldonado	57-5720
Victoriano M. Fernández	57-5802
Guillermo Ríos	57-6030
Carmen J. Martínez	57-6060
Irving Fox	57-6355
Eugene R. Hanson	57-5903
Alfonso Ortiz	57-5904
Dolores Muñiz	57-5929
Mariana Green	57-2567
Antonio J. Salib	57-6366
José Sánchez Parra	58-1880
Monsita Casiano de Aja	58-505
Frank Salgado	58-1873
Jerónimo Ruiz	58-406
Agustín Correa	58-3375
Angel Lebro	58-1874
Ana P. Widow of Villamil	58-123
María Ramona Pérez	58-404
Heirs of José Miranda González	58-1872
Pedro Orpi	58-2632
Federico Barela	59-655
José Malgor Méndez	58-725
Heirs of Germán Fernández López	58-613
José Fernández, et al.	59-6736
Marta Dalmau	59-6485
Jaime Canellas	59-8444
Luis F. Sánchez Vilella	58-5481
Jorge L. Roberts	59-2787
Ida Rivera Widow of Gaetán	58-6765
Antonio Quiñones Bird	58-6173

Judgement

On July 29, 1960 we rendered judgment in this case with the following pronouncements:

a) The complaint is dismissed as to defendants Nolla, Galib & Compañía, the Government of the Capital, United States Casualty Co., Pedro J. Tejada, and P. J. Tejada & Associates.

b) The complaint is granted against the defendant Island Constructors, Inc. and its insurer American Surety Co. of New York, on which the payment of costs is imposed, without including attorney's fees.

c) The claims against coparties filed by the Government of the Capital, Nolla, Galib & Compañía, and Island Constructors, Inc., are dismissed.

d) The complaint against third party filed by Island Constructors, Inc. against Gabriel Fuentes is dismissed.

e) The amount of the damages shall be fixed after the report of the master appointed on this same date is received and approved, as well as any other damages which the court may have found proved in conformity with the findings of fact.

After the proper hearings were held before the master, the latter rendered an award fixing by stipulation of the parties the extent and amount of the damages sustained in plaintiffs' properties, which award was approved by this court. It appears therein that the sum of $231,747 was fixed as the total amount of the damages sustained by all the plaintiffs, distributed in the manner hereinafter set forth.

On the grounds stated in the Findings of Fact and Conclusions of Law rendered on the aforesaid date, July 29, 1960, which have been attached to the record and made a part of this judgment, and after considering the Award of the Master, result of the stipulation of the parties, the

court now orders codefendants Island Constructors, Inc. and its insurer, American Surety Co. of New York, to pay the amounts set forth below to plaintiffs for the damages sustained in the immovables belonging to said plaintiffs on account of the acts which gave rise to this litigation.

No. of Case	Plaintiff	Amount
57-2067	Joaquin Valdivieso	$13,300
57-5461	Ramonita Barrientos	12,500
57-5720	César Maldonado	17,250
57-5802	Victoriano M. Fernández	11,000
57-6030	Guillermo Ríos	6,831
57-6355	Irving Fox	5,000
57-5903	Eugene R. Hanson	5,920
57-5904	Alfonso Ortiz	4,600
57-5929	Dolores Muñiz	5,400
57-2567	Mariana Green	6,000
57-6366	Antonio J. Salib	10,274
57-1880	José Sánchez Parra	7,000
58-505	Monsita Casiano de Ajá	10,864
58-1873	Frank Salgado	5,785
58-406	Jerónimo Ruiz	7,128
58-3375	Agustín Correa	10,500
58-1874	Angel Lebro	5,426
58-123	Ana P. Widow of Villamil	18,000
58-404	María Ramona Pérez	10,000
58-2632	Pedro Orpi, Jr.	6,400
59-655	Federico Barela	4,800
58-725	José Malgor Méndez	9,319
58-6765	Ida Rivera Widow of Gaetán	2,000
58-613	Heirs of Germán Fernández	10,500
57-6060	Carmen J. Martínez	7,000
58-1872	Heirs of José Miranda González	10,750
58-5481	Luis F. Sánchez Vilella	1,700

Said codefendants are also ordered to pay the sum of $3,900 to plaintiff Joaquin Valdivieso for rentals he was bound to pay at Gallardo Apartments from August 8, 1959 to this date because he had to move from his house as a result of the damages thereto, according to our Find-

ings of Fact; to Julia Rodríguez Widow of Rios and her sons Guillermo and Edwin the amount of $250 according to our Additional Finding in Case No. 57-6030 (P. 19 of our Findings of Fact); to plaintiff José Sánchez Parra the amount of $750 for the damages to the furniture and equipment of his residence; and to plaintiff Jerónimo Ruiz the amount of $5,034.10 for the benefits he failed to receive in his coffee shop and soda fountain business "Marbella". Costs are imposed upon said codefendants, without including attorney's fees.

Let It Be Registered and Notified.
Given at San Juan, Puerto Rico, February 12, 1962.

(Signed) Luis R. Polo
Judge

I attest:
Clerk

IN THE SUPERIOR COURT OF PUERTO RICO
SAN JUAN PART

Civil No. 58-6664

Damages

HERIBERTO BERLY, *Plaintiff*

v.

GOVERNMENT OF THE CAPITAL, ET AL., *Defendants.*

O R D E R

* * * * * * * * * * *

Judgment

The Master's award fixing the damages to plaintiff on the grounds set forth having been received:

a) The complaint is dismissed as to defendants Nolla, Galib & Cia., and the Government of the Capital.

b) The complaint against defendant American Surety Co. of New York upon which the payment of costs without including attorney's fees is imposed, is admitted.

c) The cross-claims filed by the Government of the Capital, Nolla, Galib & Cia., and American Surety Co. of New York are dismissed.

d) American Surety Co. of New York is ordered to pay to plaintiff the sum of $5,000 subject to the provisions of paragraph (b).

Let it be entered and notified.

Given at San Juan, Puerto Rico, July 31, 1964.

Given at San Juan, Puerto Rico, October 1, 1964.

(Signed) Luis R. Polo
Judge

IN THE SUPERIOR COURT OF PUERTO RICO

Civil No. 59-2271

Damages

LEON LYON, *Plaintiff*

v.

GOVERNMENT OF THE CAPITAL, etc., *Defendants.*

Civil No. 58-5385

Damages

AURIS M. GIRONA GONZALEZ, *Plaintiff*

v.

GOVERNMENT OF THE CAPITAL, etc., *Defendants.*

Amended Judgment

On the grounds set forth in our findings of fact and conclusions of law rendered on July 29, 1960 in the case of Ramonita Barrientos, et al. v. Government of the Capital, et al., Civil No. 57-5461 of this court, and after con-

sidering the Master's award, result of the stipulation of the parties, and in conformance with our order of this date, the court now renders this amended judgment with the following pronouncements:

a) The complaint is dismissed as to defendants Nolla, Galib y Cia., the Government of the Capital, United States Casualty Co., Pedro J. Tejada, and P. J. Tejada & Associates.

b) The complaint against defendant Island Constructors, Inc. and its insurer American Surety Co. of New York, is admitted and the payment of costs is imposed upon them without including attorney's fees.

c) The cross-claims filed by the Government of the Capital; Nolla, Galib y Cia., and Island Constructors, Inc. are dismissed.

d) The complaint against third party filed by Island Constructors, Inc. against Gabriel Fuentes is dismissed.

e) Codefendants Island Constructors, Inc. and its insurer American Surety Co. of New York are hereby ordered to pay to plaintiff León Lyon the sum of $29,500 and likewise to pay to plaintiff Auris Girona the sum of $2,000 with costs, without including attorney's fees, for the damages sustained in the immovables belonging to said plaintiffs on account of the acts which gave rise to this litigation.

Let it be entered and notified.

San Juan, Puerto Rico, November 23, 1964

Luis R. Polo
Superior Judge

I attest:
Clerk

IN THE SUPREME COURT OF PUERTO RICO

Nos. R-62-61, 156
Review

RAMONITA BARRIENTOS *et al., Plaintiffs-Appellees*

v.

GOVERNMENT OF THE CAPITAL *et al., Defendants-appellees*

No. R-62-67
Review

ISLAND CONSTRUCTOR, INC. *et al., Defendant-appellants*
CARMEN J. MARTÍNEZ CANCEL *et al., Plaintiffs-appellants*

v.

GOVERNMENT OF THE CAPITAL *et al., Defendants-appellees*

No. R-62-68
Review

JOAQUÍN VALDIVIESO LLOMPART *et al., Plaintiffs-appellants*

v.

NOLLA, GALIB & CO. *et al., Defendants-appellees*

No. R-62-69
Review

CÉSAR MALDONADO *et al., Plaintiffs-appellants*

v.

GOVERNMENT OF THE CAPITAL *et al., Defendants-appellees*

No. R-64-188
Review

LEÓN LYON and AURIES M. GIRONA, *Plaintiffs-appellees*

v.

GOVERNMENT OF THE CAPITAL *et al., Defendants-appellees*
ISLAND CONSTRUCTORS, INC. *et al., Defendants-appellants*

No. R-64-214
Review

Conjugal Partnership constituted by HERIBERTO BERLY and JULIA COLÓN, *Plaintiffs-appellees*

v.

NOLLA, GALIB & Co. *et al.*, *Defendants-appellees*
ISLAND CONSTRUCTORS, INC. *et al.*, *Defendants-appellants*

Conjugal Partnership constituted by HERIBERTO BERLY and JULIA COLÓN, *Plaintiffs-appellees*

v.

NOLLA, GALIB & Co. *et al.*, *Defendants-appellees*
ISLAND CONSTRUCTORS, INC. *et al.*, *Defendants-appellants*

MR. JUSTICE TORRES RIGUAL delivered the opinion of the Court.

San Juan, Puerto Rico, June 27, 1969.

Opinion

THE FACTS

Around the beginning of 1957 the Municipality of San Juan contracted with Nolla, Galib & Co., after public bidding held for that purpose, for the construction of a sewerage system and a pump house in the section of Ocean Park in Santurce in the amount of $433,241.48. Nolla and Galib subcontracted with appellant, Island Constructors, Inc., for the performance of that part of the contract concerning the installation of the storm-water sewer in the sum of $199,322.60, leaving for itself the construction of the pump house. The municipality approved this subcontract.

As it is usual in these kind of transactions, the contractor as well as the subcontractor secured the faithful perform-

ance of the contract and the payment of materials and labor. They also obtained liability policies to answer for the damages which might be caused in the execution of the work.

The contract required that the pipes be installed in the dry about eight feet deep. The drawings indicated that the ground-water level in that section was at a distance of about two feet from the surface of the street. They also showed that the subsoil was composed of a peat stratum which fluctuated between six and eight feet and another inferior stratum composed of fine sand up to a depth of about 21 to 23 feet. The consistency of this subsoil was very properly described by the resident engineer of the municipality as *unsafe*.

In order to perform the installation of the pipes in the dry, Island Constructors, Inc. tried to use the system of well points for the purpose of extracting the water from the subsoil. It installed a line of about 120 well points at an approximate depth of ten feet along Cacique Street from its intersection at Santa Ana Street to its intersection at Santa Cecilia Street.

On Saturday, March 30, 1957, Island Constructors, Inc. carried out a test of this system which lasted between two and four hours. Said test reduced the ground-water level in such a manner that it brought about a settlement of the ground in an area of about 1,000 feet. As a result of the settlement, cracks appeared immediately on sidewalks, walls, fences, and the sinking of floors in the neighborhood was produced. Subsequently similar damages began to appear in the properties located within that area.

In view of the occurrence, and following instructions of the inspectors of the municipality, Island Constructors, Inc. stopped the works, resuming them at the request of

the surety, American Surety Co., which feared the confiscation of the bond.[1]

Finally, Island Constructors, Inc. abandoned the performance of the work, its surety, American Surety Co., undertaking its continuation on the basis of a stipulation agreed upon with Nolla, Galib & Co. as part of a lawsuit which the latter had brought for the specific performance of the subcontract.[2]

The foregoing facts gave rise to an extensive and complex litigation which culminated in the judgment object of the petitions for review above-mentioned. Said judgment sustained the complaint against appellants, Island Constructors, Inc. and its surety, American Surety Co. of New York; dismissed the complaint as to defendants Nolla, Galib & Co., Government of the Capital, U.S. Casualty Co., Pedro Tejada, and P. J. Tejada Associates. The judgment also dismissed the cross-claim brought by the Government of the Capital against Nolla, Galib & Co., and Island Constructors, Inc., as well as the complaint against third party filed by Island Constructors, Inc. against Gabriel Fuentes.[3]

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[1] We need not relate the incidents concerning the suspension and resuming of the work, as well as the adoption of a new method for the installation of the pipes and the change of the system of well points to that of extracting water by pumping from open cut, since they do not alter in any manner whatsoever the adjudication of liability in the case.

[2] Civil Case No. 57 and 6515 filed in the Superior Court, San Juan Part, by Nolla, Galib & Co. against Island Constructors, Inc. and American Surety Co.

[3] Said judgment disposed of 32 consolidated cases. The six petitions for review above-mentioned were filed against it. Petitions Nos. 62-61, 62-156, 64-214, and 64-188 filed by Island Constructors, Inc. and American Surety Co. comprise identical assignments of errors. Petitions Nos. 62-61 and 62-156 were consolidated at appellants' request. Petitions Nos. 62-67 and 62-69 filed by Carmen Martínez Cancel *et al.*, and César Martínez Maldonado *et al.*, respectively, comprise similar assignments of errors.

For the purposes of facilitating the discussion of the different and complex questions raised in said petitions for review, we shall group the assignments of errors related among themselves, and thus grouped, we shall discuss them.

I

Assignment of Errors Concerning the Determination of Negligence and Cause of Damages [4]

The fundamental finding of the trial court concerning this question was in synthesis that the damages were due exclusively to the deficient operation of the system of well points by Island Constructors, Inc., inasmuch as the latter being aware of the nature of the subsoil did not take the necessary measures to prevent the damages; to wit, installation of the well points within sheetpiling duly sealed and the control of the pumping to prevent the displacement of great amounts of water from the subsoil.

Appellants, Island Constructors, Inc. and American Surety Co. challenge said finding on the ground that the same does not represent the most rational, just and juridical balance of the evidence received. They argue that "the settlement was the natural consequence of having lowered the ground-water level in order to install the pipes in the dry, as required by the specifications of the contract; that such settlement would have occurred irrespective of the method used for the extraction of water or the adequate manner of performing this work according to the specifications; and that the use of sealed-sheetpiling for the purpose prescribed in the specification—to prevent the collapse of the sides of the excavations—would not have prevented the descent of the ground-water level nor of the settlement of adjacent lands."

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[4] These are assignments a and b of petitions Nos. 62-61 and 62-156, and assignments b and c of petitions Nos. 64-214 and 64-188.

From the foregoing they conclude that the damages were the direct and necessary result of the works performed for the construction of the storm-water sewer and that, therefore, the Government of the Capital is the liable entity.

The evidence introduced with respect to the cause of the damages consisted mainly of expert testimony,[5] the same being extremely technical and conflicting. The trial court settled the conflict and gave entire credit to the expert of codefendant Nolla, Gatlib & Co. The careful and repeated reading we have made of the voluminous record—10 pieces of evidence with over 3,000 pages—convinces us that the trial court acted within its discretion in settling the conflict in the manner it did and that we should not disturb these findings on appeal because the same are amply supported by the evidence presented.

II

Assignments Concerning the Discharge of the Government of the Capital From Liability[6]

The trial court concluded the following on this question:

a) that the work required for the construction of the sewerage was not inherently dangerous because it was a question of engineering works ordinarily performed;

b) that said works did not require extraordinary precautions in order to prevent injury, since through the adequate use of any acceptable method to extract water from the ground, damages to neighboring buildings could not be foreseen; and,

c) that because of its inherent nature the work did not have to cause or produce risks of injury.

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[5] The court heard the testimony of five experts.

[6] It covers the assignments of petitions Nos. 62-67 and 62-69.

With respect to the foregoing findings, and as a matter of law, the trial court concluded that the relations between Nolla, Galib & Co. and Island Constructors, Inc. were those of an independent contractor and subcontractor and that, therefore, Nolla, Galib & Co. was not liable for the damages caused by Island Constructors, Inc. particularly when a work inherently dangerous was not involved. The court used this same reasoning to relieve the Government of the Capital from liability.

Appellants maintain that as a result of the conditions and nature of the subsoil, the works were inherently dangerous, for which reason the Government of the Capital was barred from delegating its duty by a relation of principal and independent contractor. We agree with this position and shall immediately turn to set forth the reasons which justify the modification of the judgment rendered by the trial court.

In general terms, an owner is not held liable for the negligent acts of an independent contractor. *Mariani* v. *Christy*, 73 P.R.R. 729 (1952). The case law, however, has established so many and different exceptions to this general principle of nonliability that some commentators as Prosser doubt its validity. Prosser, Law of Torts 483-486 (Hornbook Series, 1964).[7]

The doctrine of the inherent danger invoked by appellants in order to impose liability upon the Government of the Capital and Nolla, Galib & Co. is one of the numer-

[7] In the introductory notes to § 409 of Restatement of the Law, Torts 2d at p. 370 it is said that the exceptions to this general rule are so numerous that "it can now be said to be 'general' only in the sense that it is applied where no good reason is found for departing from it." In *Pacific Fire Ins. Co.* v. *Kenny Boiler & Mfg. Co.*, 201 Minn. 500, 277 N.W. 226 (1937), cited in said introductory note, it was also stated:

> "Indeed it would be proper to say that the rule is now primarily important as a preamble to the catalog of its exceptions."

ous exceptions to the general rule of nonliability. By virtue thereof, the owner is liable for the negligence of an independent contractor in the construction of a work which is inherently or intrinsically dangerous. Prosser, *supra* at 483; Shelton, *Employer's Liability for Negligence of His Independent Contractor*, 30 Tenn. L. Rev. 439; Anno: *Non-Delegable Duty of Employer With Respect to Work Which is Inherently or Intrinsically Dangerous*, 23 A.L.R. 1084. This exception is closely connected with another which also imposes liability upon the principal for the negligence of the contractor not only when the work is inherently or intrinsically dangerous, but also, when a work which in the natural course of events entails some risk, unless special precautions are taken, is involved. This exception originated in England in the case of *Bower* v. *Peate*, L.R.1Q.B. Div. Eng. (1876), it being stated in the following words:

> "A man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbor must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing someone else—whether it be the contractor employed to do the work from which the danger arises, or some independent person—to do what is necessary to prevent the act he has ordered to be done from becoming wrongful."

In the United States this exception has been applied with a similar language, although not as clear and precise, in *Chicago* v. *Robbins*, 2 Black (U.S.) 418.

Both exceptions, that of the inherent danger and that of *Bower* v. *Peate*, *supra*, are so closely connected that they may be considered not as separate and independent doctrines, but as part of the same rule of primary, nondelegable liability, of the owner for the negligent acts of an

independent contractor. See Anno: *Non-Delegable Duty Of Employer In Respect Of Work Which Will In The Natural Course Of Event Produce Injury, Unless Certain Precautions Are Taken*, 23 A.L.R. 1016; Anno: *Independent Contractor Rule As Applicable To Injury Or Death Of Third Person As Result Of Excavation And Refill Work*, 33 A.L.R.2d 7. Prosser considers them both as a sole exception to the general rule and he discusses it so in his treatise on torts. Prosser, *supra* at 485. Logically, the one is necessarily included in the other since any work which is inherently or intrinsically dangerous, on account of its own definition, falls within the more embracing concept of *Bower* v. *Peate*, *supra*, which refers to works which ordinarily may cause injury unless special precautions are taken. In practice, both exceptions have been indistinctly used by the state courts in order to reach the same result. Restatement of the Law, Torts, *supra* at 395. The Restatement adopts both doctrines in §§ 416 and 427 stating that both have been applied interchangeably in different cases and even in the same case.[8] The foregoing convinces us that we must adopt in our jurisdiction the accurate and comprehensive formula of *Bower* v. *Peate* which imposes

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[8] Sections 416 and 427 read as follows:

"§ 416. Work Dangerous in Absence of Special Precautions

One who employs an independent contractor to do work which the employer should recognize as likely to create during its progress a peculiar risk of physical harm to other unless special precautions are taken, is subject to liability for physical harm caused to them by the failure of the contractor to exercise reasonable care to take such precautions, even though the employer has provided for such precautions in the contract or otherwise."

"§ 427. Negligence as to Danger Inherent in the Work

One who employs an independent contractor to do work involving a special danger to others which the employer knows or has reason to know to be inherent in or normal to the work, or which he contemplates or has reason to contemplate when making the contract, is subject to liability for physical harm caused to such others by the contractor's failure to take reasonable precautions against such danger."

liability upon the owner for the negligent acts of the contractor in the performance of a work which in the natural course of events may cause injury unless precautions are taken.

Under the most comprehensive doctrines which we defend herein its is not required that the injury be a *necessary* and *direct* result of the stipulated work as we held in *Mariani* v. *Christy*, *supra*, and repeated in *Bonet* v. *Municipality of Barceloneta*, 87 P.R.R. 74 (1963). In said cases we applied the restrictive concept of the doctrine of inherent risk stating that the damages must constitute "the direct and necessary result of the stipulated work, that is, if the work to be done can not be done without danger or injury to third parties and if its very nature and existence are such as to cause or produce danger or injuries." The rule of liability of the principal being conceived in such a narrow manner, its application has no substantial virtuality and is altogether superfluous. It is elemental in our law that a person who orders another, whether independent contractor or as a mere employee, to execute an act which necessarily is going to cause injury, is liable for his own culpable act of ordering. They are clear cases of fault which fall under the provisions of § 1802 of the Civil Code, it being unnecessary to draft special doctrines of liability as we did in *Mariani* v. *Christy*, *supra*.[9] On the other hand, the works which necessarily cause harm because of their inherent nature are certainly very exceptional. Even those usually acknowledged as dangerous, electricity and dynamite, can be utilized without any risk by competent persons qualified to handle them. All of which shows the need of considering always the circumstances which surround the performance of the work and not only the work per se.

The restrictive concept that the harm is the necessary consequence of the performance of the work having been eliminated, it suffices, then, in order to hold the owner

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[9] *Mariani* v. *Christy*, *supra*, dealt with the performance of a work by an independent contractor which implied a trespass upon another's property.

liable, that there be a recognizable risk, a harm which can be foreseen. It is not necessary that the risk of causing harm be serious or inevitable. It is sufficient that from the specific circumstances which surround the performance of the work, the existence of a risk which requires that precautions be taken may reasonably be recognized. The precautions need not be of an extraordinary nature either. In *Bonet* v. *Municipality of Barceloneta* we stressed these essential elements of the owner's liability. Nevertheless, we decided the case on the basis of the restrictive concept of the harm which we disregard here. As a matter of fact we are not saying anything new. The element of foreseeability of risk mentioned herein is the same element of foreseeability which is consubstantial to all the doctrine of civil liability provided in § 1802 of the Civil Code.[10]

It is proper now to apply the principles previously enumerated to the instant case. The trial court elaborated its determination, as we already know, on the following grounds:

> a) That the work required for the construction of the sewerage was not inherently dangerous because it was a question of engineering works ordinarily performed;
>
> b) That said works did not require extraordinary precautions to prevent injury; and
>
> c) That because of its inherent nature the works did not have to cause or produce risks of injury.

It is immediately noted that the criteria utilized by the trial court are the restrictive views of the need of the injury which we reject herein.

It is beyond discussion that the construction of a storm-water sewer is a common and ordinary engineering work which usually should not anticipate damages. The same

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[10] Except, of course, those exceptional cases where objective liability may be applied.

thing can be said of other engineering works as the construction of a street, or of a dwelling building, or of a park. The anticipation of the risk and of special precautions do not depend, as we have said, on the nature of the work, but on the *circumstances* which surround its performance. In the case at bar the circumstances established by the evidence and on which there is no discussion were the following:

a) The contract for the installation of the piping for the storm-water sewerage required that the pipes be installed in the dry about eight feet deep.

b) The drawings indicated with crystal clearness —"as if they had a photograph of the subsoil" [11]— that the ground-water level in the section where the piping was to be installed was at a distance of about two feet from the surface of the street.

c) The drawings also showed that the subsoil was composed of a peat stratum which fluctuated between six and eight feet and another inferior stratum composed of fine sand up to a depth of about twenty-one to twenty-three feet.

Moreover, the following is inferred from the evidence presented:

a) The Government of the Capital had knowledge of the nature of the subsoil not only because of the drawing but because formerly some sinkings had occurred in some streets of Ocean Park which required the reinforcement of the sidewalks.[12]

b) Engineer Efraín Muratti in describing the subsoil said that "I am surprised to know that in that area there are six or seven feet of peat and that no disaster has occurred." [13]

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[11] Engineer Capacete's testimony. Tr. of Ev. Vol. 5, p. 19.

[12] Engineer Tejada's testimony. Tr. of Ev. Vol. 2, pp. 204 and 205.

[13] Engineer Efraín Muratti's testimony. Tr. of Ev. Vol. 3, p. 307.

c) The system of well points for the extraction of water requires special precautions which were not taken in this case, as we saw upon discussing the first part of this opinion.

In view of the foregoing, we are constrained to conclude that the construction of the storm-water sewer in the section of Ocean Park constituted a work in the course of which any person would have reasonably foreseen the risks of causing damages unless precautions were taken. The fundamental elements of liability—peculiar risk and special precaution—clearly appeared from all the foregoing circumstances. Therefore, the Government of the Capital was not free from liability in contracting for the performance of the work with an independent contractor. Its liability is of a primary character, nondelegable before the plaintiffs. It is liable not because of its negligence but because of the nature of the work. On the other hand, since the damages were caused by the negligence of the independent contractor, Island Constructors, Inc., upon operating deficiently the system of well points, the latter is liable for its own negligence to plaintiffs. It is also held liable to the Government of the Capital for everything that the latter shall be bound to pay, by virtue of the subcontract with Nolla, Galib & Co. by which it assumed all the obligations of the latter toward the former.[14]

[14] Section 4 of the subcontract between Nolla, Galib & Co. and Island Constructors, Inc., reads as follows:

"Section 4. The Subcontractor declares that he has thoroughly examined the drawings and specifications governing the work embraced in the above mentioned contract between the Owner and the Contractor, of which the work covered by this agreement is a part, *and he hereby agrees to assume toward the Contractor all of the obligations and responsibilities which the Contractor has assumed toward the Owner under said Contract between the Owner and the Contractor so far as they apply to the part of the work covered by this agreement.* (Italics ours.)

Consistent with the foregoing, we conclude that the trial court erred in dismissing the complaint against the Government of the Capital.

III

Assignment of Errors Concerning the Scope of American Surety Co.'s Liability Under the Public Liability Policies and Under the Performance Bonds [15]

1. The public liability policy executed by American Surety Co. covers only damages caused as a result of accidents. On the ground of this limitation, appellant, American Surety Co. elaborates the argument that the damages were not the result of an accident, inasmuch as "it was not only foreseeable but that it was advertently anticipated that no substantial damages would be caused to the other properties belonging to plaintiffs such as in effect happened as the work was subsequently continued." We do not agree.

In its common and ordinary meaning, which is the only one which we must take into consideration the term, "accident," means an unforeseen, sudden or unexpected happening from the point of view of the one sustaining the damage and not of the tort-feasor. *Knight v. L. H. Bossier*, 118 So. 2d 700; *United States Fidelity and Guaranty Co. v. Briscoe*, 239 P.2d 754; *Moore v. Fidelity and Casualty Co.*, 295 P.2d 154. See also, Appleman, 7A Insurance Law and Practice, § 4492. Therefore, the fact that appellant, Island Constructors, Inc. foresaw or could foresee that the performance of the work could cause harm is not relevant. For the prejudiced parties, the sinking of their houses was a true accident, an unforeseen, sudden, and unexpected happening.

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[15] This part covers assignments IV, V, VI, VII, and VIII of petitions 64-214 and 64-188 and assignments (g), (h), (i), (j), (k), (l), and (m) of petitions 62-61 and 62-156 consolidated with the latter.

2. Insofar as the scope of American Surety Co.'s liability under the bond is concerned, the trial court decided: a) that "the obligation of restoring the neighboring properties to the state they had prior to the execution of the works, . . . is of a contractual nature and was assumed by Island Constructors, Inc. by virtue of the terms of the subcontract. Its surety is liable for the performance of this contractual obligation under the terms of the performance bond, irrespective of whether or not negligence in the execution of the works is established, . . .";[16] b) that even though the bond was not constituted for plaintiffs' benefit, they could claim as third-party beneficiaries; c) that American Surety Co.'s liability was not limited to the total amount of its bond; and, d) that American Surety Co. assumed obligations which were more ample and inclusive than that provided for in the bond deciding to complete the performance of the subcontract for which purpose it substituted the one under the bond, Island Constructors, Inc.

We need not consider whether plaintiffs-appellees have the capacity to require the performance of the contractual obligations of Island Constructors, Inc. in connection with the restoration of the damaged properties to their original state. Also, we do not have to consider whether or not plaintiffs-appellees are entitled to claim under the bond executed by American Surety Co. for the execution of the work, since in view of our former conclusion fixing primary liability upon the Government of the Capital, the latter shall be directly liable to the plaintiffs and, as we have already seen, Island Constructors, Inc. shall be held directly liable to the Government of the Capital for all damages the latter may pay to plaintiffs. In default thereof, its surety, American Surety Co. shall be held liable.

On the other hand, the construction contract of the Government of the Capital with Nolla, Galib & Co. contains

[16] Conclusion of Law No. 12 of the trial court.

an exemption clause which imposes upon the contractor the obligation of compensating the Government of the Capital for the damages the latter may have to pay on account of the execution of the work.[17] By virtue of said clause, Nolla, Galib & Co. would be liable also to the Government of the Capital in which case Island Constructors, Inc. would also be bound to pay Nolla, Galib & Co. any amount which the latter would pay to the Government of the Capital, because it was thus bound by Section 4 of the subcontract with the former.[18] It is not necessary, however, to consider the liability of Nolla, Galib & Co. toward the Government of the Capital because the latter did not file any appeal against the provision of the judgment exempting the former.

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[17] Said clause reads:

"General Conditions — 7.11 RESPONSIBILITY FOR DAMAGE CLAIMS—

The contractor shall save harmless the Capital of Puerto Rico and all its officials, representative and agents, from all suits, actions, or claims of any character brought on account of any injuries or damages received or sustained by any person, persons, or property through the acts of the contractor, his agents or servants, or by, or in consequence of any neglect on the part of the contractor, or his agents or servants, in safeguarding the work, or through the use of inacceptable materials in the construction of the work, or by or on account of any claims or amounts recovered for any infringement of patent, trademark or copy right, and for any claims or amount arising from or recoverable under the Workmen's Compensation laws or any other laws, ordinances, by-laws, orders or decrees.' The *contractor shall be responsible for all damage or injury to property of any character during the prosecution of the work resulting from any act, omission, neglect or misconduct in the manner or method of executing said work at any time*, or due to defective work or materials, and such responsibility shall continue until the work has been completed and accepted by the Director." (Italics ours.)

[18] See footnote 14 where we reproduce said Section 4.

3. Ordinarily the liability of an insurer is limited to the payment of the penalty which appears from the face of the bond. It was thus acknowledged by the trial court but it concluded that in deciding to complete the subcontract American Surety Co. assumed a more ample an embracing obligation. The contention of the surety, American Surety Co., is that any obligation which by virtue of the bond it may assume is limited to the amount fixed in the bond itself. We do not agree.

When a surety undertakes the performance of a construction contract, as in this case, it assumes the obligations and liabilities of the original contractor. Couch, On Insurance 2d, § 47.136; *Southern Surety Co.* v. *Sealy Independent School District*, 10 S.W.2d 786 (1928 Tex.); *McClintic-Marshall Corp.* v. *Maryland Gas Co.*, 100 S.W.2d 438 (1937 Tex); *Galesburg Sanitary Dist.* v. *American Surety Co.*, 32 N.E.2d 407 (1941 Ill.); *Mazzera* v. *Ramsey*, 238 Pac. 101 (1925 Cal.). It is in the same position as the original contractor with respect to the performance of the obligations which arise from the contract without limitation as to the total amount of the bond. *Caron* v. *Andrew*, 284 P.2d 544 (1955 Cal.); *Klein* v. *J. D. & J. M. Collins*, 106 So. 120 (1925 La.) where it was said at page 122:

> "Considering, first, the contentions of the surety company it may be said that, had that company, for instance, left it to the owner to complete the work upon the default of the contractors, unquestionably the company could not be held liable for more than the amount for which it had bound itself as surety, except for such additional amounts, imposed by law, such as costs of court and statutory penalties. . . . However, if the company, upon the default of the contractors, undertook to complete the work, a different case is then presented. In that event, the company, . . . put itself in the place of the contractors from the moment

of the new undertaking,* and became liable for the costs of completing the building, without reference to the amount for which it had signed as surety. In other words, in that event, from that moment on, the company occupied the position of contractor and became liable for the costs of completion accordingly, and also for damages, as fixed in the contract, . . . for the delay in completing and delivering the building."

* Editor's Note: The phrase "of the new undertaking" which appears in the original citation was translated into Spanish "*que tomó a su cargo la obra*," which literally translated into English reads "it took charge of the work."

In synthesis, the trial court did not err in concluding that the surety assumed an obligation more ample and embracing.

Application of the Doctrine of Comparative Negligence [19]

The trial court concluded that the "settlement of the grounds would have not caused damages to the neighboring structures if the latter would have been constructed in accordance with the methods accepted in engineering for subsoils of the type existing in Ocean Park." Appellants maintain that in view of this conclusion the trial court should have applied the doctrine of concurrent negligence and reduced proportionally the compensation. Although we would admit as valid this conclusion,[20] the same has a fatal defect: Appellants did not introduce any evidence to

[19] This part refers to assignment of error No. 9 of petitions 62-61, 62-156, and 64-214.

[20] Against this position assumed by appellants there is the principle of law that the one who acts negligently assumes the responsibility of repairing the damages within the state of things as the latter stood prior to the tortious act. See: Prosser, Law of Torts 2d at p. 260.

show that part of the damages were caused by the conditions of the structures and that part was caused by their own negligence. In the absence of such evidence in the record, appellant must assume liability for all the damages sustained. *Concepción Guzmán* v. *Water Resources Auth.*, 92 P.R.R. 473.

ATTACK TO OUR JURISDICTION

Appellee, the Government of the Capital challenges our jurisdiction on the ground that the petition for review was untimely filed. It argues that the partial judgment rendered by the trial court on July 29, 1960 was a final judgment since "it decides the merits of the controversy, or the rights of the parties, without leaving anything for a future determination"; that said judgment dismissed the complaint as to the Municipality and likewise it dismissed the cross-claims made by Island Constructors, Inc. We do not agree.

Rule 44.2 of the Rules of Civil Procedure provides that when more than one claim is presented in action "the court may direct the entry of a final judgment upon one or more but not upon all of the claims *only upon an express determination that there is no just reason for delay in pronouncing judgment on such claims until final adjudication of the case and upon an express direction for entry of judgment.* In the absence of such determination and direction, any . . . decision, . . . which adjudicates less than all the claims, *shall not terminate the action* as to any of the claims, and the . . . decision is subject to revision at any time before the entry of judgment adjudicating all the claims." (Italics ours.)

The partial judgment rendered on July 29, 1960 did not expressly conclude, pursuant to the provisions of Rule 44.2, that there was no reason to postpone rendering judgment on the claims against the Municipality. The requirements of Rule 44.2 should be strictly complied with since

they seek to avoid confusion as to when the term to appeal or for review begins to count. Therefore, the judgment was not final until damages were adjudged on February 12, 1962.

ERROR NO. 10

The trial court granted Joaquín Valdivieso a compensation of $13,300 for the damages to his property plus $3,900 for rentals he was bound to pay in Gallardo Apartments from August 8, 1959 to February 12, 1962, date on which the judgment appealed from was rendered, for having been forced to move from his house as a result of the damages sustained by the latter. Appellants complain that the court granted this compensation without any evidence whatsoever of the time reasonably needed to repair said plaintiff's residence.

From the evidence presented it appears that: a) Valdivieso was forced to move from his house as a result of the conditions of the latter; b) that he paid $83 monthly as amortization of a loan with F.H.A. and $130 monthly as rent in Gallardo Apartments; c) that he was an employee of Prison Industries of the Department of Justice; and, d) that the damages to his residence were gradually manifested, for which reason we infer that it was not advisable to start repairing the house until we were sure that no more settlements would occur. Taking these circumstances as a whole, we consider that the trial court did not err in awarding the amount of $3,900 for rentals.

On appeal No. 62-68, Joaquín Valdivieso Llompart in his turn appealed from the judgment rendered by the trial court charging as error that he was not granted compensation for the suffering and mental anguish "sustained on account of the continuous noises produced by the equipment of one or of all the defendants; for the bad odor caused by the backwater; all of which is and has been preju-

dicial and offensive to plaintiffs' health and senses. . . ."[21] He relies on *Pereira* v. *I.B.E.C.*, 95 P.R.R. . . . (1967). The doctrine established in the cited case is not applicable because mental anguish for nonperformance of contract was involved therein, while herein appellant's claim was based on the disturbance of his property.[22] But irrespective of the inapplicability of *Pereira* v. *I.B.E.C.*, *supra*, the assignment is untenable because the instant case involves the construction of a public work for the benefit of all the community and, as well put by the trial court, "Those are annoyances which every citizen must suffer. . . ."[23]

ERROR NO. 11

The court granted plaintiff Jerónimo Ruiz the amount of $5,034.10 for profits not received in his cafeteria and soda fountain from the date stipulated in the contract for the

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[21] The averment as it appears from the complaint is the following:

"9.–In view of all the annoyances aforementioned, of the ruinous condition of their residences, depreciation, repair expenses, physical suffering and mental anguish sustained on account of the continuous noises produced by the equipment of one or of all the defendants, for the bad odor caused by the backwater, all of which is and has been prejudicial and offensive to plaintiffs' health and senses; for the interruption of the free and comfortable use of their property, impairing their personal well-being; the fear that the houses may collapse upon them, expenses incurred and to be incurred, the plaintiffs have sustained damages which they assess at the amount of NINTY-THOUSAND DOLLARS ($90,000)."

[22] The theory adduced by appellant before the trial court was set forth in the following manner:

"Mr. Martínez, Jr.:

* * * * * * * * * * *

No damages for moral suffering or damages to a property are claimed herein. Damages are claimed here on the basis of § 277 of the Code of Civil Procedure." Tr. of Ev. Vol. 2, p. 173.

[23] Tr. of Ev. Vol. 3, p. 176.

completion of the work, September 19, 1957, to the date when traffic was resumed along the section where his business was located, May 21, 1959. Appellant challenges this compensation on the ground that the inconveniences, annoyances, and hindrances which are necessarily caused in the course of a public improvement are not compensable.

This is, without any doubt, the general principle. But as every general rule, it has its limitations imposed by reason and by justice. The street should not be obstructed unnecessarily. Even when necessary, the obstruction should not be maintained for an unreasonable length of time. *Lefkovitz* v. *City of Chicago*, 87 N.E. 58 (1908 Ilk); *Cassel* v. *City of New York*, 153 N.Y. Supp. 410 (1915). See also, cases cited in: Anno: *Liability of Public Contractor to Property Owner for Obstructing Street*, 68 A.L.R. 1510.

In the case at bar the term agreed upon for the completion of the work was about five months. However, traffic was interrupted for about twenty months. In the light of the facts which we have previously set forth, we conclude that this interruption was unreasonable. The error assigned was not committed.

ERROR No. 12

Appellee, León Lyon[24] filed his complaint against Island Constructors, Inc. on August 8, 1958. He never had the summons issued, but in February 1959 he amended the complaint in order to join as defendant American Surety Co. as surety of Island Constructors, Inc. and under the terms of the insurance policy.

Appellant assigns as error that the trial court did not declare that the complaint in this case had prescribed. It alleges that in accordance with *Heirs of Gorbea* v. *Portilla*, 46 P.R.R. 279 and *De Jesús, v. De Jesús*, 37 P.R.R. 143, the interruption of the limitation period by the institution of a

[24] Petition for Review No. 64-188.

suit has the effect that such period must be counted anew when the interruption ceases. Hence it concludes that the cause of action against Island Constructors, Inc. has prescribed. It also argues that when American Surety Co. was included as defendant in February 1959 more than a year had elapsed since the occurrence of the damages. We do not agree.

With respect to the interruption of the limitation period by the filing of the complaint against Island Constructors, Inc., appellant's contention was already decided against its claims in *Feliciano* v. *A.S.L.*, 93 P.R.R. 638 (1966).

With respect to the defense of prescription of American Surety Co., it suffices to refer to § 20.030(2)[25] of the Insurance Code, 26 L.P.R.A. § 2003, which recognizes plaintiff's right to bring suit against the insurer even after securing final judgment against the insured. This means that in the case at bar the cause of action against American Surety Co. is still on time, although more than ten years have elapsed since the complaint was amended to join it as defendant. See: *Trigo* v. *The Travelers Ins. Co.*, 91 P.R.R. 843 (1965), which contains a magnificent discussion on the origin and scope of the aforesaid § 20.030.

ERROR No. 13

This assignment refers to Petition for Review No. 64-214. It is alleged that the trial court erred in not declaring that the complaint of Heriberto Berly had prescribed; said complaint had been filed on November 2, 1958.

From the hearing held on October 27, 1961 to argue the motion for dismissal on the ground of prescription, it is

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[25] Section 20.030(2) reads as follows:

"If the plaintiff in such an action brings suit against the insured alone, such shall not be deemed to deprive him of the right, by subrogation to the rights of the insured under the policy, to maintain action against and recover from the insurer after securing final judgment against the insured."

inferred that the damages, were "produced or noted . . . from the month of April or March 1957 to about a month ago";[26] that plaintiff Berly sent a letter to Nolla, Galib & Co. on February 28, 1958 claiming damages; that said letter was sent to Island Constructors, Inc. Therefore, Berly's claim has not prescribed.

Judgment will be rendered consistent with the terms and conclusions of this opinion.

[26] Answer given on March 6, 1959 by plaintiff Berly to interrogatories submitted to him by American Surety Co. Said answer was admitted in evidence.

IN THE SUPREME COURT OF PUERTO RICO

No. R-62-61, 156
Review

RAMONITA BARRIENTOS, *et al., Plaintiffs-Appellees*

v.

GOVERNMENT OF THE CAPITAL, *et al., Defendants-Appellees*

ISLAND CONSTRUCTORS, INC., *et al., Defendants-Appellants*

No. R-62-68
Review

JOAQUÍN VALDIVESO LLOMPART, *et al., Plaintiffs-Appellants*

v.

NOLLA, GALIB & CO., *et al., Defendants-Appellees*

No. R-64-188
Review

LEÓN LYON and AURIS M. GIRONA, *Plaintiffs-Appellees*

v.

GOVERNMENT OF THE CAPITAL, *et al., Defendants-Appellees*

ISLAND CONSTRUCTORS, INC., *et al., Defendants-Appellants*

No. R-64-214
Review

CONJUGAL PARTNERSHIP constituted by HERIBERTO BERLY and JULIA COLÓN, *Plaintiffs-Appellees*

v.

NOLLA, GALIB & CO., *et al., Defendants-Appellees*

ISLAND CONSTRUCTORS, INC., *et al., Defendants-Appellants*

Judgment

San Juan, Puerto Rico, June 27, 1969

For the reasons stated in the preceding opinion the judgments rendered by the Superior Court, San Juan Part, in the above-entitled cases, are hereby affirmed.

It was so decreed and ordered by the Court as witnesses the signature of the Chief Justice. Mr. Justice Pérez Pimentel and Mr. Justice Blanco Lugo did not participate herein.

Luis Negrón Fernández
Chief Justice

I attest:

Joaquín Berrios
Clerk

IN THE SUPREME COURT OF PUERTO RICO

R-62-67
R-62-69
Review

CARMEN J. MARTÍNEZ CANCEL, *et al., Plaintiffs-Appellants*

v.

GOVERNMENT OF THE CAPITAL, *et al., Defendants-Appellees*

CÉSAR MALDONADO, *et al., Plaintiffs-Appellants*

v.

GOVERNMENT OF THE CAPITAL, *et al., Defendants-Appellees*

Judgment

San Juan, Puerto Rico, June 27, 1969

For the reasons stated in the preceding opinion, the judgments rendered in the above-entitled cases are hereby modified so as to set aside the pronouncements relieving the Government of the Capital from liability and to sustain the cross-claims and/or complaint against third parties filed by the Government of the Capital against Island Constructors, Inc. and American Surety Company.

It was so decreed and ordered by the Court as witnesses the signature of the Chief Justice. Mr. Justice Hernández

Matos and Mr. Justice Santana Becerra are of the opinion that Nolla, Galib & Co. should also be held directly liable to appellants. Mr. Justice Pérez Pimentel and Mr. Justice Blanco Lugo did not participate herein.

Luis Negrón Fernández
Chief Justice

I attest:

Joaquín Berríos
Clerk

IN THE SUPREME COURT OF PUERTO RICO

No. R-62-61, 156
R-62-67
R-62-68
R-62-69
R-64-188
R-64-214

Review

RAMONITA BARRIENTOS, *et al.*, *Plaintiffs-Appellees*

v.

GOVERNMENT OF THE CAPITAL, *et al.*,
ISLAND CONSTRUCTORS, INC., *et al.*,
Defendants-Appellants

Motion for Reconsideration

To the Hon. Court:

Now comes appellant, American Surety Co. of New York, and through its undersigned attorneys respectfully requests the reconsideration of the judgment entered in this case on the following grounds:

1. This Court held that the findings of facts of the trial court were correct. It said: "The careful and repeated reading we have made of the voluminous record—10 pieces

of evidence with over 3,000 pages—convinces us that the trial court acted within its discretion in settling the conflict in the manner it did and that we should not disturb these findings on appeal because the same are amply supported by the evidence presented." (Page 6.)

2. This necessarily means that we must consider as a true fact "that the damages [caused to plaintiffs] were due exclusively to the deficient operation of the system of well points by Island Constructors, Inc., inasmuch as the latter being aware of the nature of the subsoil did not take the necessary measures to prevent the damages, to wit: installation of the well points within sheetpiling duly sealed and the control of the pumping to prevent the displacement of great amounts of water from the subsoil." (Opinion p. 5.) It was so determined by the trial court and affirmed on appeal by this Court.

3. This being so we must inevitably conclude that all the damages to plaintiffs were caused by the negligent acts of the subcontractor Island Constructors, Inc. when it made the initial test for the extraction of the water from the subsoil. And this necessarily means that the liability of appellant American Surety Co. for said damages must be based on that which it might have secondarily assumed for the negligent acts of said subcontractor.

4. Consequently, the latter also means that said damages were not caused by negligent acts of appellant and that the latter's liability for said damages cannot be based on the bond which appellant issued to guarantee the performance of the work. The work was performed and that was what appellant exclusively guaranteed through its performance bond. We deem it unnecesary to search jurisprudence to sustain that a performance bond does not answer for negligent acts or torts of the bonded contractor while he performs the work. Its only purpose is to guarantee that the work shall be performed. The liability of the contractor for damages to third parties as a result of his fault

or negligence while performing the work has always been insured through liability insurance policies which are also required from the contractor, as was done in this case.

5. As a matter of fact, this Court holds that the public liability insurance policy issued by appellant covers the damages caused by the negligence of the subcontractor. However, said policy has a limit of $50,000 for which reason in any event the appellant cannot be forced to pay a higher amount. Of course, the liability of the subcontractor is not limited; it is liable to plaintiffs for the amount of the damages it might have occasioned, whatever it may be. Now then, it would offend the most basic sense of justice to compel appellant to pay approximately half a million dollars for the negligent acts of the subcontractor when it only insured up to $50,000.

6. But there is more. This Court expressly concludes that "the trial court erred in dismissing the complaint against the Government of the Capital." (Opinion p. 15.) Establishing precedent it held that the liability of the Government of the Capital is primary, undelegable as to plaintiffs; that it was under the obligation of indemnifying plaintiffs notwithstanding the fact that the damages were caused by the negligence of an independent contractor. It said and held:

> "Appellants maintain that as a result of the conditions and nature of the subsoil, the works were inherently dangerous, for which reason the Government of the Capital was barred from delegating its duty by a relationship of principal and independent contractor. *We agree with this position and shall immediately turn to set forth the reasons which justify the modification of the judgment rendered by the trial court.*" (p. 7.)

7. However, when this Court renders the judgment, what it does is to affirm the judgment of the trial court; it does not modify the same as it said it should be done in order to hold the Government of the Capital liable.

8. Of course, we are aware that this Court pointed out that "in view of our former conclusion fixing primary liability upon the Government of the Capital, the latter shall be directly liable to plaintiffs and, as we have already seen, Island Constructors, Inc. shall be held directly liable to the Government of the Capital for all damages the latter may pay to plaintiffs." And it also added: "In default thereof, its surety, American Surety Co. shall be held liable." (Page 18.)

9. We agree that as decided by this Court, the consequences of this case are as aforestated, except that it should have been clarified that the liability of appellant, American Surety Co., is limited to the amount of its liability policy, that is, that it cannot exceed the sum of $50,000.

10. In other words, once it is determined that the damages to plaintiffs were caused by negligent acts of the subcontractor and that the municipality is liable to plaintiffs for said acts, then necessarily the subcontractor is likewise under the obligation of indemnifying the municipality for all the damages which the latter pays to plaintiffs. Now then, appellant as insurer of the tort liability of the subcontractor is only under the obligation to pay for the latter up to the sum of the policy it issued, that is, up to $50,000 simply because it did not agree to pay more, nor were the damages caused by appellant.

11. We repeat, just as the facts of this case have been determined, the performance bond plays no part whatsoever. It is precisely for that reason that this Court forewarns that "We need not consider whether plaintiffs-appellees have the capacity to require the performance of the contractual obligations of Island Constructors, Inc. in connection with the restoration of the damaged properties to their original state. Also, we do not have to consider whether or not plaintiffs-appellees are entitled to claim under the bond executed by American Surety Co. for the execution of the work . . ." (Page 17.)

WHEREFORE, it is respectfully requested from this Court that the mandate be withheld; a setting be made for the hearing of this motion and after having heard the parties that the judgment be reconsidered and another one entered modifying the judgment of the Superior Court and ordering the Government of the Capital and Island Constructors, Inc. to pay to plaintiffs the damages caused to them and that appellant American Surety Co. pay for the same up to the sum of $50,000 in the corresponding proportion for each plaintiff.

San Juan, P. R., July 7, 1969.

CASTRO & CASTRO
Attorneys for American Surety Co. of N. Y.

By: (Signed) F. Castro Amy
F. Castro Amy
Box 3222
San Juan, P. R. 00904

I do hereby Certify that on this same date I sent by mail copy of this motion for reconsideration to the following attorneys: Mr. José N. Moreno, 252 Tanca St., San Juan, P. R.; Héctor Martínez Muñoz, Banco de Ponce Building, San Juan, P. R.; Alberto Picò, Plaza Building, San Juan, P. R.; Jorge Sòuss, Plaza Building, San Juan, P. R.; Edelmiro Martìnez, Jr., 253 San José St., San Juan, P. R.; Rodrìguez Ema and Rodrìguez Ramòn, Midtown Building, 421 Muñoz Rivera Ave., Hato Rey, P. R.; Julio Suàrez Garrigà, 273 San Jorge St. Santurce, P. R.; Guillermo Bauzà, Padlìn Building, San Juan, P. R. and José M. Ramos, 57 Dr. Veve, Bayamòn, P. R.

(Signed)
F. Castro Amy

IN THE SUPREME COURT OF PUERTO RICO

R-62-61
R-62-67
R-62-68
R-62-69
R-62-156
R-64-188
R-64-214

Review

RAMÓNITA BARRIENTOS, *et al.*, *Plaintiffs-Appellees*

v.

Government of the Capital, NOLLA & GALÍB & Co., U.S. Casualty Co., Defendants

ISLAND CONSTRUCTORS, INC. and AMERICAN SURETY CO., OF NEW YORK, *Defendants-appellants*

Order

San Juan, Puerto Rico, April 24, 1970

The foregoing motions for reconsideration filed by the Government of the Capital and by American Surety Co. of New York, are hereby denied.

It was so agreed by the Court and certified by the Clerk. Mr. Chief Justice, Mr. Justice Pérez-Pimentel, Mr. Justice Hernández Matos, and Mr. Justice Blanco Lugo did not participate herein.

Joaquín Berrios
Clerk

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 428

AMERICAN SURETY CO. OF NEW YORK, *Petitioner*,

v.

RAMONITA BARRIENTOS, ET AL., *Respondents*.

BRIEF FOR RESPONDENT GOVERNMENT OF THE CAPITAL IN OPPOSITION

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No. 428

AMERICAN SURETY CO. OF NEW YORK, *Petitioner,*

v.

RAMONITA BARRIENTOS, ET AL., *Respondents.*

BRIEF FOR RESPONDENT GOVERNMENT OF THE CAPITAL IN OPPOSITION

QUESTION PRESENTED

Whether it is a deprivation of property without due process of law for a State Court to hold that a surety which undertakes to finish the work upon default of its principal contractor is liable for the cost of restoring the adjoining properties to their original condition, as provided in the contract, even if that cost exceeds the limit specified in the bond.

ARGUMENT

I. The federal question was not timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari.

The judgment against petitioner herein for the full amount of damages was first rendered by the Superior Court of Puerto Rico, San Juan Part, on February 12, 1962 (Pet. App. 29a-32a). Petitioner *did not* file then a motion for rehearing raising the constitutional questions that it now presents before this Court. On March 14, 1962 petitioner filed a petition for review before the Supreme Court of Puerto Rico and again it *failed to raise* any question of due process of law. (R. 102-114). After the Supreme Court affirmed the judgment below, petitioner filed a motion for reconsideration on October 15, 1969 and *no* federal question was raised there either. (R. 152-156). As a matter of fact, petitioner admits (Petition, 7) that the first mention of "due process" was made in its Reply to the Motion for Reconsideration of the Government of the Capital and petitioner then disclaimed any intention to "criticize the opinion of this court" (R 164). It was not until May 4, 1970 in a motion to have the mandate returned and withheld that petitioner stated: "In the petition for certiorari before the Supreme Court of the United States appellant shall contend that the judgment rendered in this case is unconstitutional because it deprives appellant of its property without due process of law. . . ." (R. 173-74). Said motion did not request that the Supreme Court of Puerto Rico pass on the federal questions mentioned therein and at no prior time was the Court given an opportunity to consider the constitutional questions now raised before this Court.

We submit that the federal questions were not timely or properly raised in the court below and should not be considered by this Court. *Street* v. *New York*, 394 U.S. 576, 582 (1969), and cases cited.

II. The judgment of the Supreme Court of Puerto Rico is correct and proper.

The Supreme Court of Puerto Rico correctly held that once the petitioner American Surety Co. undertook to finish the work, it stood in the shoes of its principal Island Constructors and had to fulfill all the obligations of the latter without regard to the amount fixed in the bond. Other courts in the United States have similarly ruled. See: e.g. *McWaters and Bartlett* v. *United States*, 272 F.2d 291, 295 (CA 10, 1959), where it was held in a case involving this same petitioner that:

> "Without detailing the evidence, we content ourselves by saying there is evidence to sustain the court's finding of fact that American Surety Company took over Clark's contract and agreed to complete it. That would, of course, subject itself to full liability for all amounts incurred in furnishing labor and material in the completion of the job, irrespective of the $69,000 liability limitation in its bond. The court, accordingly correctly concluded, as a matter of law, that by such action American Surety Company waived the penalty limitation of its bond."

The obligations assumed by American Surety included the restoration of private property to its original condition or making good the damage therein. (R 183-184). The subcontract whose completion was undertaken by American Surety provided that the subcontractor would complete the work "in accordance with the conditions and applicable provisions of the

above named contract between the Owner and the Contractor" (R 188) and it agreed to assume "all the obligations and responsibilities which the Contractor has assumed toward the Owner" (R 189).

Once the Supreme Court decided that the Government of the Capital was directly liable to plaintiffs (owners of the adjacent property) it was bound to grant the cross-complaint of the Government against American Surety[1] for indemnity. To do otherwise would have released American Surety from the liability that it assumed when it exercisyd the option to perform the contract. The Supreme Court of Puerto Rico did not err in recognizing a cause of action to the Government for indemnity under the bond; certainly such recognition can not be considered a deprivation of due process of law.

The mistake of petitioner lies in insisting that it was held liable for the negligence of the subcontractor. Actually its liability stems from the specific provisions of the contract which it undertook to perform itself when its principal failed.

III. The judgment of the Supreme Court of Puerto Rico, even if erroneous, does not amount to a violation of due process.

In *Slochower* v. *Board of Ed. of N. Y.*, 350 U.S. 551; 562 (1956), it was said: "For this Court to hold that state action in the field of its unchallenged powers violates the due process of the Federal Constitution requires far more than mere disagreement with the legal conclusions of state courts."

The holding of the court below that the liability of American Surety under the circumstances of this case

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[1] Contrary to Petitioner's allegation (Petition, footnote 3), respondent herein *did* file a cross claim against subcontractor "and its insurer" American Surety dated June 20, 1958 (R 37-39).

extended beyond the limits of the bond, is a matter of local law, and so is the recognition of a right to indemnity in favor of respondent herein. This Court has acknowledged the supreme power of state courts to interpret and declare the written and unwritten laws of the state. *Brinkerhoff-Faris Trust & Saving Co.* v. *Hill,* 281 U.S. 673, 680 (1930), where it was said that "the mere fact that a state court has rendered an erroneous decision on a question of state law does not give rise to a claim under the 14th amendment or otherwise confer appellate jurisdiction on this court".

This case involves the interpretation of a surety contract under Puerto Rican law and it is well settled that construction of a local contract under local law does not give rise to a federal question. *Black* v. *Cutler Laboratories,* 351 U.S. 292 (1955). A long line of decisions hold "that the provisions of Sec. 10 Art. 1 of the Constitution protecting the obligation of contracts against state action, is directed only against impairment by legislation and not by judgment of courts". *Tidal Oil Co.* v. *Flanagan,* 203 U.S. 444, 451 (1924).

Finally, this Court has specifically ruled that great deference must be paid to decisions of the Supreme Court of Puerto Rico in matters of local law. *De Castro* v. *Board of Commissioners,* 322 U.S. 451 (1944).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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